Environmental Hearing Board

Adjudications and Opinions

2004

Volume I

COMMONWEALTH OF PENNSYLVANIA

Michael L. Krancer, Chairman

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

2004

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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 2004.

The Environmental Hearing Board was originally created as a departmental administrative board within the Department of Environmental Resources (now the Department of Environmental Protection) by the Act of December 3, 1970, P.L. 834, No. 275, which amended the Administrative Code, the Act of April 9, 1929, P.L. 177. The Board was empowered "to hold hearings and issue adjudications...on orders, permits, licenses or decisions" of the Department. While the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, No. 94, upgraded the status of the Board to an independent, quasi-judicial agency, and expanded the size of the Board from three to five Members, the jurisdiction of the Board remains unchanged.

ADJUDICATIONS

OPINIONS

2004

ENVIRONMENTAL HEARING BOARD DECISIONS

ENVIRONMENTAL HEARING BOARD PRACTICE AND PROCEDURE

COMMONWEALTH OF PENNSYLVANIA
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

BRIAN E. STEINMAN HAULING	:	
	:	
v.	:	**EHB Docket No. 2003-170-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 6, 2004**

OPINION AND ORDER ON
MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

A motion to dismiss is denied where dismissal of an appeal is too harsh a sanction for an appellant's failure to perfect his appeal by failing to notify the Board that he had served a copy of his appeal on the appropriate individuals at the Department of Environmental Protection, as required by the Board's rules. However, the Board will grant a motion for extension of the discovery and other pre-hearing deadlines in order to remedy any disadvantage the Department may have suffered as a result of the appellant's failure to serve the Department with a copy of his notice of appeal.

OPINION

This appeal involves an assessment of civil penalty by the Department of Environmental Protection (Department) on Brian Steinman Hauling. Mr. Steinman appealed the assessment by letter but did not include all of the information required by the Board's rules at 25 Pa. Code §

1021.51, dealing with the content of a notice of appeal. Pursuant to § 1021.51(g), an appellant is required to serve a copy of his notice of appeal on the following offices at the Department: 1) the office of the Department that took the action being appealed and 2) the Office of Chief Counsel.[1] Subsection (i) requires the appellant to provide satisfactory proof that service was made on these offices.

On August 4, 2003, the Board issued an order to Mr. Steinman directing him to perfect his appeal by August 25, 2003 by filing certain information with the Board, including information indicating he had served the aforementioned offices of the Department with a copy of his notice of appeal. Mr. Steinman did not fully comply with this order and, therefore, the Board issued a second order on September 4, 2003, again requiring Mr. Steinman to indicate he had served a copy of his notice of appeal on the aforementioned Departmental offices. Mr. Steinman responded to the September 4 order with a letter of his own, which did not indicate he had served the Department with his appeal.

On December 3, 2003, the Department filed a motion to dismiss the appeal based on Mr. Steinman's failure to provide the Board with proof that he had served the Department with a copy of his notice of appeal. The Department does not dispute that it is in possession of the notice of appeal; rather, it was provided to them by a source other than Mr. Steinman. Mr. Steinman did not respond to the Department's motion.

Rule 1021.161 provides that the Board may impose sanctions upon a party for failure to abide by a Board order or a Board rule of practice and procedure. The sanctions may include a number of actions, including dismissal of an appeal. 25 Pa. Code § 1021.161. Whether to impose sanctions is within the discretion of the Board and must be appropriate given the magnitude of the

[1] Section 1021.51(g) also requires that a copy of the notice of appeal be served on the recipient

violation. *Township of Paradise v. DEP*, 2001 EHB 1005, 1007; *Environmental and Recycling Services v. DEP*, 2001 EHB 824.

In *Kleissler v. DEP*, 2002 EHB 617, Judge Labuskes set forth the analysis for determining whether sanctions are warranted, and if so, the magnitude thereof:

> ...the [Board's] rules are designed to ensure that no one litigant obtains an unfair advantage. If a party's disregard for proper procedure gives it such an unfair advantage, sanctions may be required to even out the playing field. The sanctions are not designed to punish the wrongdoer; they are aimed at relieving the unfair disadvantage (i.e. prejudice) suffered by the innocent party. Thus, in most cases, our analysis begins with a determination of whether there has been a violation, but it ends with an assessment of the harm caused to the innocent party. Whether sanctions must be imposed and the severity of the sanctions will in large measure depend upon what measures are necessary to alleviate the unfair disadvantage created by the transgressor's misconduct. *See generally, Township of Paradise* [citations omitted]; *ERSI v. DEP*, 2001 EHB 824, 829...
>
> In the final analysis, we cannot lose sight of the fact that our basic objective is to arrive at a proper resolution of the appeal *on its merits*. *ERSI*, 2001 EHB at 830. A sanction that is too severe can be just as detrimental to that objective as allowing violations to go unsanctioned. Ultimately, the ideal sanction will ensure fair treatment of the litigants and not in any way interfere with the most accurate, fully informed resolution of the case.

2002 EHB at 619-20.

There is no question that Mr. Steinman failed to abide by the Board's orders and rule 1021.51 by failing to perfect his appeal. To date, he still has not demonstrated that he served a copy of his notice of appeal on the appropriate personnel at the Department. However, dismissal of an appeal is an unduly harsh sanction given the rather low level of severity of the violation. The Department has alleged no disadvantage that it has suffered as a result of Mr. Steinman's failure to serve them with a copy of the notice of appeal. Based on the Department's motion and

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of an action in a third party appeal. That subsection is not applicable in this matter.

brief, it is our understanding that the Department does now have in its possession a copy of the notice of appeal. Since the purpose of the proof of service requirement in rule 1021.51 is to ensure that the appropriate offices of the Department receive a copy of any notice of appeal that is filed with the Board, that requirement has been met.

As stated in *Kleissler*, the decision to impose sanctions and the determination of the severity thereof depends in large part on what measures are necessary to alleviate the unfair disadvantage caused to the opposing party by the offending party's failure. Rather than dismissing Mr. Steinman's appeal, a more appropriate remedy is to extend the deadlines for discovery and other pre-hearing filings to provide the Department additional time to prepare its case given the fact that it received the notice of appeal at a later date than when it was filed.

By the same token, we do not condone Mr. Steinman's conduct in this matter. He may not choose simply to disregard the Board's rules or orders. A failure to abide by a particular rule or order in the future may indeed subject him to sanctions up to and including dismissal of his appeal. We note that Mr. Steinman is proceeding without counsel in this matter, and we caution him that that is no excuse for failing to follow the Board's rules or orders. Should he decide to continue to proceed without proper legal representation, he does so at his own risk. *Kleissler v. DEP*, 2002 EHB 737, 740; *Van Tassel v. DEP*, 2002 EHB 625, 629.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BRIAN E. STEINMAN HAULING	:	
	:	
v.	:	**EHB Docket No. 2003-170-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 6th day of January, the Department's motion to dismiss is **denied**. However, by separate order the Board will extend the discovery and pre-hearing deadlines set forth in Prehearing Order No. 1.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administration Law Judge
Member

DATE: January 6, 2004

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

JOSEPH J. BRUNNER, INC.	:	
	:	
v.	:	**EHB Docket No. 2002-304-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BEAVER VALLEY ALLOY FOUNDRY COMPANY, Intervenor	:	**Issued: January 8, 2004**

OPINION AND ORDER
ON MOTION TO COMPEL

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis:

The Department of Environmental Protection may assert the deliberative process privilege in proceedings before the Board. The Board will determine whether the privilege will actually be applied on a case-by-case basis after considering several factors, such as whether the communication in question was confidential, deliberative, and whether it concerned issues of law or policymaking, together with a comparison of the opposing party's interest in disclosure of the communication as contrasted with the Department's interest in maintaining its confidentiality.

OPINION

Joseph J. Brunner, Inc. ("Brunner") filed this appeal from the Department of Environmental Protection's (the "Department's") determination that Brunner must pay a $4.00 fee pursuant to Section 6301 of Act 90 of 2002, 27 Pa.C.S.A. § 6301, for each ton of a certain material used as alternate daily cover at Brunner's landfill. Brunner and the Department have

conflicting ideas on how Act 90 is to be interpreted and implemented with respect to alternate daily cover.

Brunner served the Department with a request for production of documents during the course of discovery. The Department declined to produce documents that it identified in a privilege log. The Department asserts that the documents are protected by the work product doctrine, the attorney-client privilege, and the deliberative process privilege. Brunner has filed a motion to compel production of some of the secreted documents.[1] The Department opposes the motion, maintaining that the documents embody communications that are privileged.

Deliberative Process Privilege

The deliberative process privilege, where it exits, protects governmental officials from disclosing their confidential deliberations of law or policymaking, reflecting opinions, recommendations, or advice. *New Jersey Department of Environmental Protection v. DEP* ("*NJDEP*"), EHB Docket No. 2001-280-C, slip op. at 2 n.2 (February 21, 2003). The thinking behind the privilege is that governmental officials will ultimately make better decisions that will inure to the public's benefit if the officials know that they can freely express their ideas to each other without fear of having those ideas eventually become public. *Redland Soccer Club v. Department of the Army*, 55 F.3d 827, 853 (3d Cir. 1995); *NJDEP*, slip op. at 15.

As with most privileges, the purpose of the deliberative process privilege is to promote open, candid communication. Just as society has an interest in encouraging frank discussion between spouses, doctors and their patients, and lawyers and their clients, it has an interest in encouraging public employees to engage in frank debate before implementing policies that affect us all. As is also the case with most privileges, however, the goal of promoting open dialogue is

[1] Brunner seeks the following documents: Motion, Exhibit 8, Numbers 19-24, 27-39, a 6/26/02 "Counsel's memo," and a 7/03 counsel's "summary"; Motion, Exhibit 9, Numbers 44-66, 70, 71, and a 7/02 Hess draft letter, revised draft, and revisions to draft.

achieved only at the cost of excluding otherwise probative evidence in the litigation process. To that extent, the privilege necessarily impinges on the rights of private litigants and hinders the Board in the exercise of its responsibility to produce the best, most complete record possible. *Lower Paxton Township v. DEP* ("*Lower Paxton*"), 2001 EHB 256, 260-61. The privilege is also inconsistent with the notion that governance in a free society should generally be conducted as openly as possible. *Kocher Coal Company v. DER*, 1986 EHB 945, 953.

The extent to which the Pennsylvania courts have adopted a deliberative process privilege is not entirely clear. *See NJDEP*, slip op. at 4-6 (discussing history of the privilege); *Lower Paxton*, 2001 EHB 256, 258-60 (history of the privilege). Protracted discussion regarding that question is not warranted here because it appears that the matter is under active consideration by the Pennsylvania Supreme Court. *Tribune-Review Publishing Company v. Department of Community and Economic Development*, 814 A.2d. 1261 (Pa. Cmwlth.), *appeal granted*, 825 A.2d. 640 (Pa. 2003).

This Board historically did not recognize a deliberative process privilege. *F.A.W. Associates v. DER*, 1990 EHB 1802; *City of Harrisburg v. DER*, 1990 EHB 585. The trend, however, is very much in the opposite direction. *NJDEP, supra.* Pending further guidance from the Pennsylvania Supreme Court, we hold that the Department is entitled to assert a deliberative process privilege in Board proceedings.

If the Department believes that the privilege applies, it must assert the privilege by way of a privilege log (e.g., for evidence sought in discovery), an objection (e.g., for evidence sought through oral testimony), or other appropriate vehicle. The Department should provide as much detail regarding the material in question as it can without effectively waiving the privilege, but at

a minimum, it should identify the date, author, recipient, and subject matter of the communication.

If the opposing party presses the matter with regard to some or all of the material based upon a credible showing of need, we will apply a two-step analysis. First, the Department will be required to demonstrate to the Board that the communication qualifies for the deliberative process privilege. *Lower Paxton*, 2001 EHB at 261. Second, if we are satisfied that the communication qualifies, because the privilege is not absolute, we will then need to perform a balancing test on a case-by-case basis to decide whether the opposing party's interest in disclosure of the material outweighs the Department's interest in its confidentiality. *Id.* In most cases, this determination will require an in camera inspection of the evidence in question. *See Kerr v. U.S. District Court*, 96 S.Ct. 2119 (1976) (in camera review is a highly appropriate and useful means of dealing with claims of governmental privilege).

Determining whether the privilege applies

The deliberative process privilege applies to (1) confidential (2) deliberations (3) of law or policymaking. *Commonwealth ex rel. Unified Judicial System v. Vartan*, 733 A.2d 1258, 1263 (1999) (plurality); *Tribune-Review*, 814 A.2d at 1263-64; *NJDEP*, slip op. at 2 n.2.

As with any other privilege, the deliberative process privilege only applies to *confidential* communications. *Vartan*, 733 A.2d at 1263. Thus, for example, if the communication has already been broadcast to outsiders, the privilege does not apply. Even if it is not disseminated outside the agency, a communication broadly distributed within the agency may not be the type of "confidential" communication contemplated by the privilege. We will look at the circumstances surrounding the communication to assess whether the communication was intended to be private and was, in fact, kept private.

The communication is only privileged if it was *part of* the agency's *deliberations*. *NJDEP*, slip op. at 15; *Lower Paxton*, 2001 EHB at 859. The decision must have contributed toward the formulation of an agency decision or it is not "deliberative." The Department will need to explain the connection between a particular communication and the agency's decision. Even ideas and suggestions that are ultimately rejected can nevertheless form part of the deliberative process; the key is that the communication was expressed *in the context of* devising an institutional decision. This contextual analysis is roughly akin to a showing of causation--it is the connection between two things (cause/effect, communication/decision) that is being scrutinized.

Furthermore, in order to be deliberative, it must be shown that disclosing the communication would expose the actual decision making process. A deliberative communication is the expression of an idea. It is an opinion, recommendation, suggestion, or advice regarding a particular set of facts or circumstances, as opposed to a communication of the facts or circumstances themselves. For example, if the Department creates a document compiling statistics, that document is not likely to be the sort of consultative communication that is protected. A document containing a recommendation about what the Department needs to do in light of the statistics, however, is more likely to be "deliberative."

Finally, the courts have stated that a communication is only privileged if it reflects on legal or policy matters. *Vartan*, 733 A.2d at 1263; *LaValle, supra*; *Tribune-Review*, 814 A.2d at 1264. Although courts have not expounded on what they mean by "legal or policy matters," it would seem that it is not just a communication regarding *any* agency decision or action that qualifies. In our mind, the phrase normally connotes a matter of general application not particular to a particular party's circumstances. It is program oriented; more regulatory than

adjudicative. There are no bright lines regarding this or any of the criteria set forth in this opinion. We will simply need to apply our best judgment on a case-by-case basis.

Balancing competing interests

There are several evidentiary privileges that apply regardless of the importance of the evidence that is being excluded: It is so important to protect the social policy underlying the privilege that the evidence is excluded even if, for example, it could have been dispositive. *See, e.g., Bradford Coal Company v. DEP*, 1985 EHB 938, 940 (attorney work product). The deliberative process privilege is not such a privilege. It is a "qualified" privilege. *NJDEP*, slip op. at 16; *Lower Paxton*, 2001 EHB at 261. Thus, even if the evidence qualifies for protection, the Board may still direct that it be disclosed if the opposing party's interest in disclosure of the material is greater than the government's interest in maintaining its confidentiality. *NJDEP*, slip op. at 16; *Lower Paxton*, 2001 EHB at 261. The analysis bears some semblance to Pennsylvania Rule of Evidence 403, which authorizes the Board to exclude probative evidence based on considerations of undue prejudice, cumulative presentation, and the like.

On the one hand, we must weigh the importance of the evidence to the appellant. To what extent does the communication contain information that is relevant to the appellant's case? Is the same information available from other sources? What is the quality of those alternative sources, if they exist? Is the information unnecessarily cumulative or does it add obvious value? Is the communication specific to the appellant, which would weigh heavily in favor of allowing disclosure, or more generic in nature?

Against the value of the evidence to the appellant we must weigh the effect that disclosure would have on frank and independent discussion within the Department. The agency would have an interest, for example, in preventing disclosure of communications that are

particularly candid or personal in nature, or otherwise sensitive. The matter in discussion may be highly politicized, the subject of an evolving program, or there may be some other consideration that favors the application of the privilege despite probative content. The extent to which the communication is damaging to the Department's case on the merits is *not* particularly relevant.

In deciding both whether the privilege applies and whether to apply it, we will examine all of the facts and circumstances. In addition to the various considerations discussed above, there are other inquiries that will inform our decision. At the risk of stating the obvious, our analysis will usually begin with by examining the content of the communication. We will also identify who was involved in the communication. For example, as a general rule, the higher the communicants are in the chain of command, the more likely the privilege applies.[2] A document from a subordinate to a superior may be more likely to contain protected recommendations, as compared to a directive coming down from on high, which is more likely to contain instructions to staff explaining a decision already made. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 354, 868 (D.C. Cir. 1980). As noted above, the identity of the communicants can also have a lot to do with whether the document is "confidential."

There is a great deal of discussion in the case law regarding whether a communication is "predecisional," but not much discussion on what that really means or how it adds to the analysis. The difficulty arises in defining the so-called "decision." If the communication merely elaborates on a single, distinct policy decision that has already been made, the communication does not qualify as deliberative. But we suspect that such a clear-cut situation will rarely occur. Governmental agencies tend to be engaged in a continuing process of formulating, reformulating, revising, and changing policies. If the purpose of the privilege is to conduce uninhibited

[2] There are exceptions to virtually every rule in this opinion. For example, a communication about a particular appellant's specific situation, otherwise appropriate for disclosure, will generally not be protected simply because a high-level official participated. *See Lower Paxton.*

discussion, it should not matter whether the "decision" happens to be the decision that is under appeal.[3] Still further, a so-called postdecisional document may refer extensively to earlier communications otherwise entitled to protection. Rather than attempt to create an ironclad pre/postdecisional rule, we will examine the timing of the communication more generally to assess the extent to which it is deliberative, relevant, and sensitive.

In addition, the reason for the communication is important. Generally speaking, the context in which the communication was made will often be critical. The method used to create, memorialize, and store the communication may also be informative.

In summary, in deciding whether to apply the deliberative process privilege to a particular communication, we will consider the following factors:

- Confidentiality
- Deliberations
  - Context – connection to a decision or action
  - Opinion, advice, etc. v. facts
- Law or policy
- Relevance
- Sensitivity

In analyzing these factors, we will consider all pertinent facts, including the who, what, where, when, why, and how of the communication.

In this appeal, there is no complaint regarding the procedures that have led up to Brunner's motion to compel. It appears that the Department prepared a proper privilege log, and keeping in mind the subject matter of this dispute,[4] Brunner has demonstrated a credible need for

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[3] Brunner's motion illustrates this point. It directs our attention to a July 5, 2002 letter and argues that any documents created after that date are postdecisional and not privileged. It is not immediately apparent why there should only be one operative "decision" and that that decision is the July 5 letter. This appeal is not from the July 5 letter.

[4] This appeal involves a question of statutory interpretation. The Department's institutional interpretation of the statute is relevant. Accordingly, internal discussions regarding the formulation of that interpretation may be relevant. For example, the Department contends that its interpretation "has remained consistent with its official interpretation of the requirements of the Act and has never modified

some of the communications at issue. Therefore, we direct the Department to mark copies of the documents in question so that they correspond to their identification in the logs and submit one copy of each document to the Board for an in camera inspection within ten days of this opinion and order.[5] Following its inspection, the Board will return all of the documents to the Department along with an order advising the Department which, if any, of the documents must be disclosed.[6]

Attorney-Client Privilege

Brunner is also seeking an order compelling the Department to disclose certain documents requested in discovery over the Department's objection that they are protected by the attorney-client privilege. That privilege protects confidential communications between attorney and client. 49 Pa.C.S. § 5928; *Sedat, Inc. v. DER*, 641 A.2d 1243, 1244-45 (Pa. Cmwlth. 1994). The privilege applies to governmental attorneys when they are acting in their capacity as attorneys. *Gould v. City of Aliquippa*, 750 A.2d 934, 937 (Pa. Cmwlth. 2000); *Sedat*, 641 A.2d at 1244; *Defense Logistics Agency v. DEP*, 2000 EHB 1218, 1220. The privilege does not apply if the government attorney is the decision-maker, as opposed to legal counsel giving advice to the decision-maker. *Sedat*, 641 A.2d at 1245.

In order to be protected, the communication must have been made in the course of the client's effort to obtain informed legal advice. *National Railroad Passenger Corp. v. Fowler*,

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that interpretation." (Brief p. 5.) Brunner is not required to take that contention at face value. It is entitled to explore the contention through discovery.

[5] The Department in this discovery dispute argues that the deliberative process privilege applies, but it provides no detail on why particular documents not only qualify but should be protected. An affidavit explaining why obtain documents are particularly sensitive would have been helpful. *See City of Colorado Springs v. White*, 967 P.2d 1042, 1053 (1998). We understand the constraints under which the parties are operating. The Department cannot get into too much detail without defeating its goal of preserving confidentiality. Brunner is required to make arguments about documents that it cannot see. That is why we are left to perform an in camera inspection.

[6] In lieu of these procedures, the parties, of course, retain the option of entering into an appropriate confidentiality agreement.

788 A.2d 1053, 1064 (Pa. Cmwlth. 2001). Thus, a communication from one governmental official to another that merely copies in an attorney in order to keep the attorney informed, as opposed to being made in the course of soliciting legal advice, may not be protected.

Based upon our review of the privilege log, Brunner has raised a credible claim that some of the documents in question may not satisfy the criteria prerequisite to an application of the attorney-client privilege. Accordingly, we will perform an in camera inspection in accordance with the procedure outlined above to resolve the dispute on a document-by-document basis.

Attorney Work Product

The work product doctrine protects from disclosure the mental impressions of a party's attorney or the attorney's conclusions, opinions, memoranda, notes of summaries, legal research or legal theories. Pa.R.C.P. 4003.3. Again, the doctrine applies to the work of governmental attorneys. *Sedat,* 641 A.2d at 1244-45. The key question is whether the material in question reflects the *attorney's* work product. "Documents, otherwise subject to discovery, cannot be immunized by depositing them in the lawyer's file." Pa.R.C.P. 4003.3, *Explanatory Comment.*

Our review of the privilege log reveals that Brunner has raised a credible claim that some of the disputed documents may not satisfy the criteria prerequisite to the application of the work product doctrine. Accordingly, we will perform an in camera inspection in accordance with the procedures outlined above.

Accordingly, we enter the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOSEPH J. BRUNNER, INC.	:	
	:	
v.	:	**EHB Docket No. 2002-304-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BEAVER VALLEY ALLOY FOUNDRY COMPANY, Intervenor	:	

ORDER

AND NOW, this 8th day of January, 2004, the Department shall on or before **January 20, 2004** submit to the Board the documents that are the subject of Brunner's motion to compel for an in camera inspection in accordance with the instructions set forth in the foregoing opinion.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: January 8, 2004

c: **DEP Bureau of Litigation**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

STEWART & CONTI DEVELOPMENT COMPANY, INC.	:	
v.	:	**EHB Docket No. 2002-059-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROBESON TOWNSHIP, Intervenor	:	**Issued: January 12, 2004**

OPINION AND ORDER
ON MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis:

An appeal from the Department's disapproval of an Act 537 sewage plan revision is dismissed as moot where, during the pendency of the appeal, the Township passes and the Department approves a new, unappealed plan revision that supersedes the revision under appeal.

OPINION

Robeson Township, Berks County (the "Township") revised its Act 537 Official Sewage Plan to account for a 55-lot subdivision owned by Stewart & Conti Development Company, Inc. ("Stewart & Conti"). The revision provided that the development would be served by a package treatment plant that would be decommissioned if public sewer lines were run to the development. The Department of Environmental Protection (the "Department") disapproved the revision. Stewart & Conti appealed.

While this appeal was pending, the Township decided to change its plan for the area of the subdivision. The Township revised its official plan to provide that, instead of a package plant, Stewart & Conti would be permitted to install temporary holding tanks (subject to receiving the appropriate permits, approvals, etc.). In addition, instead of envisioning the *possibility* of public sewerage, the new plan provides that there *will* be public sewerage. The Department approved the new revision. The Department's approval was not appealed.

The Department has filed a motion to dismiss this appeal as moot. The Township, an intervenor in the appeal, has filed a brief in support of the Department's motion. Stewart & Conti opposes the motion. Stewart & Conti acknowledges that the Township now has a new plan, but it argues that this appeal is not moot because the Township's newly revised plan addressed the alleged defects in the old plan revision, so Stewart & Conti's original planning module can now be approved.

Even if this were true,[1] the immediate difficulty with Stewart & Conti's argument is that this Board does not act upon Stewart & Conti's planning module. The planning authority, in this case, the Township, acts upon planning modules and decides whether it wishes to revise its plan based upon the requests set forth in the modules. The Department reviews the Township's actions, and this Board reviews the Department's actions. We are not in a position to "approve" Stewart & Conti's planning module as Stewart & Conti has requested.

The question originally presented in this appeal was whether the Department erred by disapproving a version of the Township's plan that no longer exists. There is nothing that we can do with respect to that earlier version that would have any effect on the later version of the plan. It is not possible to use the earlier, now defunct version of the plan as a vehicle for

[1] There is nothing to suggest that the Department is any more favorably disposed toward a package plant alternative now than it was before. The new plan does not authorize a package plant. "Approving" the planning module would not be consistent with the plan as it now exists.

reviewing the new plan. Even if we concluded that the Department committed egregious errors in approving the obsolete plan, it would not matter. Such a ruling would have no effect on the new plan.

It is important to understand that the Township can revise its official plan as often as it likes, subject, of course, to Departmental approval. The pendency of an appeal from a prior version of the plan does not prevent the Township from passing a new plan and seeking the Department's approval of the new plan. Now that the plan has been changed and approved, the Township would neither be required nor authorized to act in accordance with an old plan that no longer exists, even if we were to conclude that the Department should have approved that plan.[2]

At bottom, Stewart & Conti would like us to decide that a package plant pending indefinite public sewerage would have been an acceptable planning alternative. But that is not what the Township plans to do now in any event. It may or may not have been an acceptable alternative, but the Township has now chosen to pursue a different course. That course has been approved and is now unassailable due to the absence of an appeal.[3] In a very real sense, events have deprived us of the ability to render meaningful or effective relief. There is no point to proceeding with the appeal. Accordingly, we exercise our discretion to dismiss the appeal as moot. *See Realty Engineering Developers, Inc. v. DER*, 1993 EHB 242.

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[2] There is no question here that the new plan supplanted the old plan. This is not a case where, say, a later revision deals with a different area of the Township than the earlier plan revision. Had the later revision left planning for the Stewart & Conti development unchanged, this would have been a different case.

[3] An appeal from the second revision *might* have had the practical effect of leaving the package plant/indefinite sewerage option in play, but that situation is not presented here.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STEWART & CONTI DEVELOPMENT COMPANY, INC.	:	
v.	:	**EHB Docket No. 2002-059-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROBESON TOWNSHIP, Intervenor	:	

ORDER

AND NOW, this 12th day of January, 2004, the Department's motion to dismiss is granted and this appeal is dismissed as moot.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: January 12, 2004

c: **DEP Bureau of Litigation**
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SECRETARY TO THE BOARD

SOLEBURY TOWNSHIP, BUCKINGHAM TOWNSHIP, & DELAWARE RIVERKEEPER, DELAWARE RIVERKEEPER NETWORK & AMERICAN LITTORAL SOCIETY	:	
v.	:	**EHB Docket No. 2002-323-K (Consolidated with 2002-320-K & 2003-012-K)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, Permittee	:	**Issued: January 16, 2004**

OPINION AND ORDER ON
MOTION TO DISMISS

By Michael L. Krancer, Chairman

Synopsis:

The Pennsylvania Department of Transportation's (DOT) motion to dismiss as moot, in which the Department of Environmental Protection (Department or DEP) concurs, is granted. Where the Department rescinds a 401 Water Quality Certification, which forms the basis for Appellants' appeals, the Board is unable to grant effective relief and the appeals are moot. None of the usual exceptions to the mootness doctrine apply.

Factual and Procedural Background

Before us is DOT's Motion to Dismiss the appeals filed by Buckingham Township (Buckingham) at EHB Docket No. 2002-320-K, Solebury Township (Solebury) EHB Docket No. 2002-323-K, and Delaware Riverkeeper, the Delaware Riverkeeper Network, and the American Littoral Society (Delaware Riverkeeper) at EHB Docket No. 2003-012-K, which were

consolidated at EHB Docket No. 2002-323-K. On February 20, 2003 we issued an Opinion and Order addressing a prior Motion to Dismiss filed by DOT. *Solebury Township v. DEP*, EHB Docket No. 2002-323-K (Opinion issued February 20, 2003). The factual and procedural background of this case was set forth in detail there. We will restate, to some degree, that background here in the interest of having an integrated opinion on this motion.

The present appeals arise from issuance by the Department of a Clean Water Act, Section 401, Water Quality Certification (401 Certification) to DOT for the U.S. 202, Section 700 highway project (Section 700 Project) on January 20, 1999. The January 20, 1999 401 Certification letter also contained approval of the Environmental Assessment (Environmental Assessment or EA) that had been submitted with the request for 401 Certification.[1] Appellants' Notices of Appeal state that they are appealing the Section 401 Water Quality Certification for the DOT Section 700 Project. The Section 700 Project is a prospective 11-mile stretch of limited access, four lane highway which, if constructed, will connect U.S. Route 202 in Upper Gwynedd Township, Montgomery County to U.S. Route 611 in Doylestown Township, Bucks County.

Following the Board's Opinion and Order denying DOT's first Motion to Dismiss, the

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[1] The Clean Water Act creates standards for the discharge of pollution into the waters of the United States. Specifically, Section 404 of the Clean Water Act, 33 U.S.C. § 1344, establishes a permitting program for the discharge of dredged or fill material into the navigable waters of the United States. In an effort to afford states the right to manage the development and use of land and water resources, section 401 of the Clean Water Act provides that:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions of . . . this Act.

33 U.S.C § 1341. Thus, requiring applicants in the 404 permitting program to obtain a 401 Water Quality Certification, from the Department in this case, as part of the permitting process.

Department and DOT filed a Joint Motion for Summary Judgment and Solebury, Buckingham and Delaware Riverkeeper filed Cross Motions for Summary Judgment. The essence of the grounds for the DOT/DEP motion were: (1) lack of standing of the Appellants; (2) the Environmental Assessment upon which the Section 401 Certification was based was administratively final; and (3) the matters being challenged by the Appellants were beyond the scope of matters within the purview of a Section 401 Water Quality Certification. DEP later withdrew the third basis as a ground for its motion but DOT continued to maintain that ground.

The essence of the Appellants' motion for summary judgment was the theory that the Department had granted the 401 Certification with the use of an illegally truncated review process. Appellants theory rests on the legal proposition that the Chapter 105 encroachment permit process operates legally in lock step with the Section 401 Certification process. Indeed, Appellants maintained that DOT was required to have applied for a Section 105 permit in conjunction with its Section 401 Certification request and that the two processes were co-extensive both in substance and timing. The truncated review process used here allegedly skipped some of the specific substantive requirements of the Chapter 105 permitting process. According to Appellants, there were certain specific design deliverables which were legally required to have been accomplished as part of the Chapter 105 process which, because the two processes are bound together, also must be completed before granting a Section 401 Certification. Appellants referred to the alleged fatal process defect as advanced acquisition of a 401 Certification and the resultant permit as an illegal or defective provisional 401 Certification.

DEP did not dispute that not all the steps required for a Chapter 105 permit were in place when it granted the Section 401 Certification. DEP told us that, under its view of the regulations, they did not have to be. DEP and DOT maintained that Appellants' view of the

regulations was erroneous. DEP referred to the process as the Integrated NEPA/404 Process which it claimed to have employed in this case and which it claimed to be completely appropriate.

The cross-motions for summary judgment were scheduled for *en banc* oral argument before the Board on November 13, 2003. On November 10, 2003, however, DEP rescinded the Section 401 Certification under appeal. On November 6, 2003 DOT had sent a letter to the Department requesting that the DEP's approval of the 401 Certification be rescinded. By letter dated November 10, 2003, the Department complied with DOT's request and rescinded the Environmental Assessment and 401 Certification. Immediately thereafter, on November 12, 2003, DOT filed this Motion to Dismiss these appeals as moot. The Board postponed both the *en banc* argument and the substantive consideration of the Joint Motion and Cross Motions for Summary Judgment in order to address DOT's Motion to Dismiss. The Department concurs in DOT's Motion and the Appellants have filed timely responses in opposition to the Motion to Dismiss, which is now ripe for decision.

DOT's motion is straightforward. It argues that the Department's rescission of the January 20, 1999 approval of DOT's Environmental Assessment and 401 Certification renders the appeals moot. Specifically, DOT argues that because the 401 Certification that formed the basis of the appeals no longer exists the Board cannot grant relief to the Appellants.

The Appellants object to dismissal of the appeal and argue that the appeals should not be dismissed because various exceptions to the mootness doctrine apply. Buckingham argues that the conduct complained of may recur and is likely to evade review upon recurrence. Specifically, DOT may apply for a new 401 Certification without an accompanying application for a Section 105 permit or may change the "project purpose" which would alter the alternatives analysis under

Section 105. In addition, Buckingham argues that the issue here is of great public importance. Delaware Riverkeeper argues that the allegedly illegal process employed is capable of repetition and likely to evade review upon recurrence. It says that the issue presented by the truncated or abbreviated 401 Certification process is of great public importance because of economic and environmental costs. Specifically, there would be substantial economic and environmental costs of allowing DOT to proceed with an attempted abbreviated 401 Certification process and that this justifies keeping this appeal live and ongoing.

Solebury, while also arguing that the matter should escape being dismissed under the mootness doctrine, takes a slightly different and additional approach. Initially, Solebury argues that because the conduct complained of is likely to recur the appeal is not moot. In other words, matters can escape dismissal as moot if the situation under review is likely to recur, regardless of whether review would be evaded if the matter did recur.

Solebury also argues that the appeal should only be dismissed as moot if the following conditions are applied:

> a. The appeal is dismissed with prejudice as to both the issuance of a 401 Water Quality Certification and the approval of the Environmental Assessment.
>
> b. In considering any new request for a 401 Water Quality Certification DEP must comply with all applicable rules and regulations including, but not limited to, the consideration of all relevant information available as of the date of the re-application.
>
> c. PennDOT must provide notice to Appellants regarding both its request for a new 401 Water Quality Certification as well as any actions taken with regard o its evaluation of the Smart Mobility Alternative.

Solebury Memorandum of Law, p.6. While Solebury's meaning seems self-explanatory with respect to conditions b. and c., a word of explanation should be provided as to condition a.

Solebury explains that under condition a., "neither PennDOT nor DEP [w]ould be allowed to rely upon the prior approvals/actions as a basis for a new DEP action." *Id.* at 4.

Standard of Review

As we recently stated in *Jack Boggs & Falling Spring Technologies, LLC v. DEP*, EHB Docket No. 2003-026-K:

> The Board evaluates motions to dismiss in the light most favorable to the non-moving party. *Ainjar Trust v. DEP*, 2000 EHB 505, 507; *Wheeling and Lake Erie Railway v. DEP*, 1999 EHB 293, 295. The Board treats motions to dismiss the same as motions for judgment on the pleadings: a motion to dismiss will be granted only where there are no material factual disputes and the moving party is clearly entitled to judgment as a matter of law. *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1282.

Jack Boggs & Falling Spring Technologies, LLC v. DEP, EHB Docket No. 2003-126-K, slip op. at 3 (Opinion issued May 13, 2003); *quoting Donny Beaver and Hidden Hollow Enterprises, Inc., t/d/b/a Paradise Outfitters v. DEP*, 2002 EHB 666; *see also County of Berks v. DEP,* EHB Docket No. 2002-286-K, slip op. at 5 (Opinion issued February 4, 2003).

Discussion

The question before us is whether as a matter of law the instant appeals are moot in light of the Department's rescission of the 401 Water Quality Certification which forms the basis of the appeals.

"It is axiomatic that a court should not address itself to moot questions and instead should only concern itself with real controversies, except in certain exceptional circumstances." *Goetz v. DEP*, 2001 EHB 1127, 1131 (quoting *In re Glancey*, 518 Pa. 276, 282 (1988)); *See also Tinicum Township v. DEP,* EHB Docket No. 2001-263-L (Consolidated with 2002-101-L) slip op. at 3 (Opinion issued June 18, 2003); *Horsehead Resource Development Company, Inc. v. DEP,* 780 A.2d 856 (Pa. Cmwlth. 2001) (an appeal before the Environmental Hearing Board is moot where the orders that were basis of the appeal are withdrawn). The appropriate inquiry in

determining if a case is moot is whether the litigant has been deprived of the necessary stake in the outcome or whether the court or agency will be able to grant effective relief. *See Horsehead Resource Dev. Co, supra* 780 A.2d at 858 (citing *Al Hamilton Contracting Co. v. DER*, 494 A.2d 516 (Pa. Cmwlth. 1985)); *see also Goetz*, 2001 EHB at 6. Under the various exceptions to the mootness doctrine a court will not dismiss. For example, where the conduct complained of is capable of repetition yet likely to evade review, where issues of great public importance are involved, or where a party will suffer a detriment without a decision. *Sierra Club v. Pennsylvania Public Utility Commission*, 702 A.2d 1131, 1134 (Pa. Cmwlth. 1997, *aff'd*, 557 Pa. 11 (1999); *see also Horsehead Resource Development Co., Inc. v. DEP, supra.*

Recently, in *Tinicum Township v. DEP,* EHB Docket No. 2001-263-L (Consolidated with 2002-101-L) slip op. at 3 (Opinion issued June 18, 2003), the Board addressed a question of mootness quite similar to the one presented here. *Tinicum* involved the issuance of a Noncoal Surface Mining Permit and an NPDES permit to a permittee that owned and operated a quarry in Tinicum Township. The mining permit allowed the permittee's mining operations to expand and include blasting and extraction of shale from its quarry and the NPDES permit allowed dewatering to continue. During the pendency of the appeals, an agreement for sale of the quarry was reached. Permittee filed a motion to dismiss the appeal as moot. While the motion was pending, both the mining permit and NPDES permit were surrendered to the Department. As a result of the surrender of the permits, the permittee argued that the appeals were rendered moot, as the Board was incapable of providing the relief requested. Tinicum argued that the case involved issues of public importance such that an exception to the mootness doctrine applied. The Board held that the appeals were moot stating "surrender of the permits has effectively voided consent for the activities Appellants find objectionable and left the Board unable to

provide the relief requested." *Tinicum* slip op. at 4; *see also Au v. Department of Environmental Protection*, 2001 EHB 527 (where Department cancels a permit which forms the basis of an appeal no effective relief can be granted rendering the appeal moot).

In this case, there is no question that DEP's rescission of the 401 Certification is complete and unequivocal and Appellants do not contend otherwise. The rescission has erased the Department's action to which Appellants have objected leaving the Board unable to grant any relief and with no extant case or controversy to decide.

We do not see that any exception to the mootness doctrine applies which commands a different result. Appellants' chorus of opposition to dismissal in this case is focused on the notion that DEP and DOT will "do it again" or are even doing it again now. That is, another truncated Section 401 Certification either will happen or is in the process of happening now. Moreover, Buckingham states that DOT is not only likely to repeat the truncated Section 401 process here, but "that it will be repeated in various 'large' projects throughout the Commonwealth." Buckingham Memorandum of Law, p. 3. Both Buckingham and Delaware Riverkeeper take issue with alleged representations supposedly made by DOT and/or its counsel regarding how it would now proceed with the Section 700 Project. Appellants say that we can and should keep the case because DEP's and DOT's potential engagement now in the truncated Section 401 Certification process again and returning to the Board on appeal would be economically and environmentally wasteful. In this regard, beyond wanting us to issue an advisory opinion, all Appellants, especially Solebury with its proposal for dismissal with conditions, convey the message that they want the Board to act in the role of a watchdog to assure that DEP and DOT do not, going forward, engage in any untoward practice with regard to the new on-going or the prospective DOT attempt to secure Section 401 Certification.

The flaws in these lines of reasoning are apparent and obvious. If "it", meaning the granting of the 401 Certification with the allegedly improper truncated review process, or any other allegedly deficient process for that matter, does happen again in connection with this or any other Section 401 Certification anywhere else, an appeal from that action would lie. The granting of any 401 Certification for this project, or any other one in Pennsylvania, will be, by definition, an appealable action. Thus, quite the opposite of being conduct which upon recurrence is likely to evade review, this is conduct that, upon recurrence, could not evade being reviewable. Whatever DOT says about how it might proceed this time to attempt to secure a Section 401 Certification is totally beside the point in terms of determining whether this case is moot or not. The point is that this Section 401 Certification which is the subject of this appeal has been rescinded. If another Section 401 Certification emanates from DEP regarding this project that Appellants see as improper for any reason, including the same reason they had alleged in this case, then an appeal will lie from that action at that time.

Appellant Solebury refers us to a Ninth Circuit case which provides, in essence, that where a party voluntarily ceases the allegedly unlawful activity in response to a lawsuit but is otherwise free to return to it at any time that the matter is not moot unless the party shows that "subsequent events [have] made it absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur". *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123, 1127 (C.D. Cal. 2001), *aff'd*, 2003 U.S. App. LEXIS 4197. This standard would put the burden on the defendants, in this case DEP and DOT to show that it is absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur *without* linking the potential for recurrence to the evasion of review in the event of recurrence.

DOT attempts to marginalize the *99 Cents Store* case, and the formulation of the exception to mootness stated therein, by characterizing the case and the principle as only "applying mootness precedents in the Ninth Circuit". DOT Reply Brief at 2 n.2. This characterization by DOT is not correct, accurate or fair. The *99 Cents Store* formulation has appeared in a host of federal court decisions including, most recently, the United States Supreme Court in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC) Inc.*, 528 U.S. 167, 189, 145 L. Ed.2d 610, 632, 120 S. Ct. 693, 708 (2000). It has been rehearsed in both the Third Circuit and the Commonwealth Court of Pennsylvania. *See Ames v. Westinghouse Electric Corp.*, 864 F.2d 289, 291-92; *New Jersey Turnpike Authority v. Central Power & Light Co. et al.*, 772 F.2d 25, 31 (3rd Cir. 1985); *Cox v. City of Chester et al.*, 464 A.2d 613, 616 (Pa. Cmwlth 1983); *Highway Auto Service v. DER*, 439 A.2d 238, 240 (Pa. Cmwlth. 1980). Thus, the *99 Cents Store* recitation cannot and should not be completely discounted as being merely a point of law unique to the Ninth Circuit.

We do note, though, that no court which has annunciated the *99 Cents Store* formulation has meant to say that it supplants or replaces the usual exception to mootness that the matter be capable of repetition *and* would evade review. That standard is still very much alive and well in Pennsylvania. *See, e.g., Sierra Club et. al v. PUC, supra*, 702 A.2d at 1134 (exception to mootness doctrine were the conduct complained of is capable of repetition yet likely to evade review). One of the reasons we think that it would not be appropriate to apply the *99 Cents Store* standard here to defeat dismissal is that the standard does not comfortably fit either the particular circumstances of this case nor our view of the statutorily created, reserved and distinct roles of the Board, DEP and DOT respectively. We would still be issuing an academic advisory opinion if we were to accept the urged standard, find that the DOT had not made the requisite

showing and proceed to "decide" the challenge to the now rescinded Section 401 Certification. Such an exercise is especially unwarranted here because, as we have already demonstrated, if the matter complained about does recur, not only will it not be likely to evade review, it will by operation of law, be certainly subject to review. Another reason not to accept Solebury's invitation to apply the *99 Cents Store* standard in isolation is that the practical effect of accepting would be to ensconce the Board in a managerial supervisory role over DOT and DEP in which it does not belong. Indeed, the Appellants' overarching theme that the Board needs to stay involved in this case to steward what DEP and DOT do now with respect to the in-progress Section 401 Certification process, or the Section 700 Project more generally, is a major deficiency of their position. We do not enjoy the general oversight authority to undertake the oversight role Appellants request. We doubt that even a court which did have such authority would choose to exercise it in the fashion we are being urged to do so in a case like this one where the action at hand is so patently moot *and* so undoubtedly capable of being reviewed upon recurrence and with such review being temporally situated such that it would have to be completed before the Section 700 Project would be free of all legal impediments.

DEP and DOT will act on any future Section 401 Certification request for the Section 700 Project in accordance with their best judgment as to the appropriate and legal exercise of their respective statutory rights and responsibilities. We can and will undertake the role of reviewing tribunal with respect to any Section 700 Project 401 Certification which may be granted in the future which is properly appealed. That process is in line with the way the Legislature distributed our respective rights and responsibilities.

Appellants' contention that the matters raised in this appeal are of such great public importance to overcome the mootness do not convince us to keep this case at this time under the

procedural posture we have outlined. First, as we have demonstrated, if DEP issues the 401 Certification for the Section 700 Project using the supposedly offensive procedure, then Appellants will at that time be able to appeal again and raise the same complaint which will then be subject to full legal review here. Second, although, the alleged truncated Section 401 Certification process is a very interesting issue, as can be testified to by the copious briefing of that subject by the parties on summary judgment practice, that issue is gone now in this case by virtue of the fact that the 401 Certification which was supposedly based on that process is gone. Thus, for the purposes of this case at this time, our delving into whether the granting of a now rescinded and gone Section 401 Certification had been granted erroneously in the first place would be a quintessential academic exercise and any opinion issued would be nothing more than an advisory opinion.[2]

Accordingly, we issue the following Order:

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[2] Buckingham requested in its papers that the Board stay its decision on the pending Motion to Dismiss until it received a response to a "Right to Know" request which was submitted on December 1, 2003, regarding DOT's intentions to proceed with the Section 700 Project. The request for stay is denied because the Right to Know request has no bearing nor any relevance to the determination whether this litigation is moot.

We also, specifically decline to dismiss "with prejudice as to both the issuance of a 401 Water Quality Certification and the approval of the Environmental Assessment" as requested by Solebury in its proffered condition a. We have already discussed proffered condition a. insofar as it invites the Board to participate as trustee of the renewed Section 401 Certification process. We declined that invitation for the reasons we have already discussed. Beyond that, to the extent that the notion of dismissal "with prejudice" suggests any determination of the merits of the subjects raised in summary judgment practice, that notion is antithetical to what is being done by this Opinion and Order. There has been no determination of any of the merits of the subjects of the summary judgment practice.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SOLEBURY TOWNSHIP, BUCKINGHAM TOWNSHIP, & DELAWARE RIVERKEEPER, DELAWARE RIVERKEEPER NETWORK & AMERICAN LITTORAL SOCIETY	:	
v.	:	**EHB Docket No. 2002-323-K (Consolidated with 2002-320-K & 2003-012-K)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, Permittee	:	

ORDER

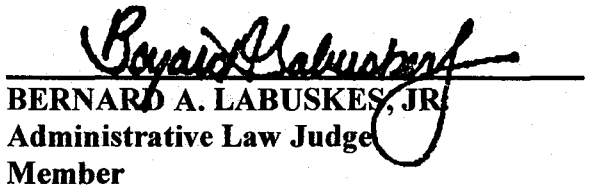
AND NOW, this 16th day of January, 2004, Appellants' appeals are dismissed as moot.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member



BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

Judge Miller did not participate in the deliberations or decision in this matter.

DATED: January 16, 2004

c: **DEP Bureau of Litigation**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

LOWER MOUNT BETHEL TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2003-013-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EASTERN INDUSTRIES, INC.	:	**Issued: January 26, 2004**

OPINION AND ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis

The Board grants in part and denies in part a motion for partial summary judgment filed by a permittee in an appeal of a noncoal surface mining permit. The Board will not dismiss the appealing township's objections which the permittee claims require expert testimony because the permittee fails to produce evidence or to explain why expert testimony is necessary. Similarly, many of the permittee's contentions are not adequately supported by evidence of record. However, several of the township's objections raising narrow issues which the permittee contends are not relevant to this permit are not adequately supported by the township in its response. Therefore we must grant summary judgment concerning equipment utilized at the site and approvals by certain agencies.

OPINION

This motion for partial summary judgment has its genesis in an appeal of a surface mining permit by Lower Mount Bethel Township, Northampton County. The permit, authorizing operation of the Riverton Sand Pit Operation by Eastern Industries, Inc. (Permittee), was issued by the Department in December 2002. The Township filed a notice of appeal objecting to the issuance in 23 numbered paragraphs. The Permittee has filed this motion seeking summary judgment on 19 of those objections on the basis that various claims either: (1) require expert testimony; or (2) are not relevant; or (3) are outside the Board's jurisdiction. Although we must grant the Permittee's motion as it relates to the Township's objections on the topic of equipment to be used at the site and approvals by certain other agencies, we find that the Permittee's motion on the remaining objections fails to establish that it is entitled to judgment in its favor, as we explain in more detail below.

The Board may grant a motion for summary judgment where the record, consisting of the pleadings, depositions, answers to interrogatories, admissions of record and affidavits, show that no genuine issue of material fact exists *and* that the moving party is entitled to judgment as a matter of law.[1] When a motion for summary judgment is made and properly supported, the responding party may not rest upon the mere allegations or denials of the pleadings, but must adduce evidence from the record or affidavits filed with the response, demonstrating that there is a genuinely disputed issue

---

[1] 25 Pa. Code § 1021.94(b); Pa. R. Civ. P. Nos. 1035.1 and 1035.2; *County of Adams v. Department of Environmental Protection,* 687 A.2d 1222, 1224 n.4 (Pa. Cmwlth. 1997); *Burnside Borough v. DEP*, EHB Docket No. 2002-138-C (Opinion issued March 27, 2003).

of fact or a challenge to the credibility of a witness.[2] Although both the Township and the Permittee recognize these standards, neither the motion nor the response live up to them.

The Permittee argues that nine of the Township's objections require expert testimony in order for the Township to ultimately prevail. The majority of these objections are claims that the permit application either lacks certain information or that the information which was submitted is insufficient. These objections include an alleged lack of a geological survey;[3] failure to adequately address noise, dust or "other noxious materials";[4] failure to adequately address erosion and sedimentation control;[5] failure to set forth an appropriate reclamation plan;[6] failure to set forth "design and operational impact upon the Delaware River and the Delaware River Watershed";[7] failure to adequately address the impact of the site on historic and recreational areas of the Township;[8] and compliance with NPDES permit requirements.[9] In response the Township contends that the question of whether or not the application contained such materials can be established from government and municipal witnesses.

We do not believe that summary judgment is appropriate here, based solely on the lack of expert testimony. Although we agree with the Permittee that certain aspects of these issues are highly technical in nature, the Permittee has only made a general averment that expert testimony is necessary based on the general topic described by the

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[2] Pa. R.C.P. No. 1035.3; *Drummond v. DEP*, 2002 EHB 413.
[3] Objection No. 5.
[4] Objection Nos. 7, 8.
[5] Objection Nos. 10, 15.
[6] Objection No. 17.
[7] Objection No. 19.
[8] Objection No. 20.
[9] Objection No. 21.

Township's notice of appeal. We denied a motion for summary judgment for an identical reason in *Weiss v. DEP*,[10] where the permittee only made vague assertions concerning which facts required expert testimony and failed to adduce exhibits from the permit application in support of its position.[11] The Permittee argues that its motion is distinguishable from *Weiss* because its insistence that these objections require expert testimony is not vague, and unlike *Weiss* it does not seek dismissal of the Township's entire appeal. First, that the permittee in *Weiss* sought dismissal of the entire appeal was not the pivotal factor in our decision; it was the fact that the permittee's motion was not adequately supported. Second, the Permittee's averments in the present motion are not specific enough nor are they adequately supported by the record. The Permittee attempted to introduce additional facts with an exhibit of interrogatory answers appended to its reply brief. Not only is it improper to support a motion with new facts introduced in reply[12], but these answers do not justify the relief sought by the Permittee.

To sum, in this case, as alleged by the Township, it is possible that the regulations require a permit to contain certain information which may clearly be lacking. Missing documentation can conceivably be established from Department or lay witnesses. Therefore, the Permittee has not established that it is entitled to judgment in its favor and we deny the Permittee's motion for summary judgment on the Township's Objections 5, 7, 8, 10, 15, 17, 19, 20 and 21.

The Permittee argues that the Township's contentions that (1) the permit application does not contain any lease agreement between the property owner and the

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[10] 1996 EHB 1565.
[11] *Id.* at 1567.
[12] *Township of Florence v. DEP,* 1996 EHB 1399.

permit applicant;[13] (2) does not reference information between the previous applicant and the current applicant;[14] and (3) fails to identify the type of equipment which will be utilized,[15] are irrelevant because the information is not required by the Noncoal Act.[16] The Permittee does note that in the case of the lease agreement and information concerning the previous applicant, some materials were submitted as part of the permit application. Yet, these materials were not included as an exhibit in support of the Permittee's motion. The Township, in response, only insists that these materials are relevant, but fails to explain why or include any analysis of the legal provisions of the Noncoal Act or its regulations which make them relevant.

In spite of the Township's complete failure to adequately respond to the Permittee's motion relating to Objection Nos. 1 and 2, we will deny summary judgment. Section 7(c)(7) of the Noncoal Act[17] does require specific documentation of the consent of the landowner to mine his property. Further Section 8(b) of the Act[18] also empowers the Department to deny a permit on the basis of unlawful conduct of certain associates of a permittee, which may or may not make the previous permit applicant a relevant consideration if it falls into one of the relationships enumerated in Section 8(b). Accordingly, we will at this time grant the Township the benefit of the doubt concerning the relevancy of Objections 1 and 2 and deny the Permittee's motion.

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[13] Objection No. 1.
[14] Objection No. 2.
[15] Objection No. 6.
[16] Noncoal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, *as amended*, 52 P.S. §§ 3301-3326. (Noncoal Surface Mining Act).
[17] 52 P.S. § 3307(c)(7).
[18] 52 P.S. § 3308(b).

However, without some explanation concerning the relevance of the description of the equipment to be utilized at the site, we can not deny the Permittee's motion for judgment on Objection No. 6, relating to the identification of equipment to be used. Simply denying the validity of the Permittee's position and restating the objection in the notice of appeal, without any reference to the statute or regulations which may require such identification, is not sufficient to demonstrate that there is an issue appropriate for hearing.[19] The Permittee's motion for summary judgment on Objection No. 6 of the Township's notice of appeal is granted.

The Permittee next argues that further objections made by the Township are beyond the Board's jurisdiction to consider. These objections include the failure of the application to include information concerning noise;[20] an air quality permit;[21] a highway occupancy permit;[22] failure to document review by other agencies such as the Delaware River Basin Authority, Lehigh Valley Planning Commission and others;[23] compliance with NPDES permit requirements;[24] fails to include a proper reclamation plan;[25] fails to demonstrate compliance with township ordinances[26] and fails to adequately address traffic and safety concerns.[27]

First, it is simply wrong to argue that the Board has no jurisdiction to consider these topics. The Environmental Hearing Board Act, which defines our jurisdiction,

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[19] Pa. R.C.P. No. 1035.3.
[20] Objection No. 7.
[21] Objection No. 2.
[22] Objection No. 13.
[23] Objection No. 14.
[24] Objection No. 21.
[25] Objection No. 19.
[26] Objection No. 18.
[27] Objection No. 22.

provides the Board with the authority to consider any action taken by the Department, including the issuance of permits.[28] In fact, no final action of the Department is considered final until a person affected has had an opportunity for a hearing on an appeal from such an action.[29] In our *de novo* review of the action in this matter, we may consider not only materials which were reviewed by the Department, but additional materials admitted into evidence at the hearing as well.[30] Therefore, if materials concerning the topics enumerated above were considered by the Department, this Board has jurisdiction to consider them as well. We could deny the Permittee's motion on this basis alone.

However, if what the Permittee is really arguing is that materials on these topics were submitted to the Department and that there is no genuine issue of fact to support the Township's claim that they were not, we deny the Permittee's motion on this basis as well. The Permittee's factual assertions concerning Objection No. 11(reclamation), Objection No.16(erosion plan/soil conservation plan),[31] Objection No. 17 (reclamation), and Objection No. 21 (NPDES), are not supported by the record or any exhibits attached to the motion. Although the Permittee makes some references to portions of the permit, these sections are not currently part of the record because they were not attached to the

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[28] Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. § 7514; *Pequea Township v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998).

[29] *Id.*

[30] *See, e.g., Pequea Township v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998); *O'Reilly v. DEP*, 2001 EHB 19.

[31] The Permittee's motion quotes the Township's objection concerning the erosion and sedimentation plan. However, Objection No. 16 relates to consistency with the county soil conservation plan. Regardless of which topic the Permittee sought to dismiss, the motion is denied.

notice of appeal[32] or otherwise made a part of the record by the Permittee's motion. Therefore reference to it can not support a factual assertion without the inclusion of the appropriately supported exhibit with the motion.

Further the Permitee's claim that it submitted a proper air quality permit is supported by a permit issued to H.B. Mellot Estate, Inc., not to the Permittee, Eastern Industries, Inc.[33] No information concerning the relationship between these entities is mentioned anywhere. In addition, the Permittee's motion contains nothing to demonstrate that this permit covers all air pollution sources involved in the proposed operation. Similarly, the highway occupancy permit submitted in support of its motion to dismiss Objection No. 13 is issued to Chester and Betty Jo Crane and includes no obvious reference to the mining permit issued to Eastern Industries, Inc.[34]

However, the Permittee does include exhibits which show that it received approval from some of the agencies referenced by the Township's Objection No. 14, namely the Lehigh Valley Planning Commission,[35] the Pennsylvania Historical and Museum Commission,[36] and the Northampton County Conservation District.[37] The Township in its response simply restates its objection but does not provide support in the record to establish that these approvals by the three agencies were inadequate. Therefore

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[32] The Township's notice of appeal includes only a copy of the Department's letter approving the permit, which constitutes the Department's action but does not automatically incorporate the permit provisions themselves into the record.

[33] Ex. E.

[34] *See* Corrected Ex. F to the Permittee's motion, submitted by letter dated November 18, 2003.

[35] Ex. G.

[36] Ex. H.

[37] Ex. I.

to the extent that the Township's Objection No. 14 challenges approvals by the three agencies noted above, the Permittee's motion is granted. It is denied in all other respects.

The Permittee alleges that the Board has no jurisdiction to consider noise, township ordinances and traffic safety. As we explained above, to the extent that the regulations require the Department to consider these topics in reviewing mining permits, they are clearly within our jurisdiction. The Department may be required to consider noise in the context of nuisance[38] or blasting and local ordinances pursuant to Acts 67 and 68 amending the Municipalities Planning Code.[39] Similarly we are unwilling to dismiss the Township's claim concerning traffic safety as it relates to mine activity at this juncture based on the Permittee's citation to *Hopewell Township v. DEP.*[40] That case held that the Department does not need to consider dust and noise generated by traffic on local roads.[41] However, the Township's objection appears to be more general than that and for the time being we will permit it to pursue this claim.

Finally, the Township makes a great deal of the fact that it believes that it was not provided a "full and complete opportunity to be heard" at a meeting held by the Department in November, 2002.[42] The Permittee disputes this. Of course, an affected party's due process rights are protected by a full hearing before the Board; unless a statute provides otherwise, the Department is not required to hold a due process

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[38] *Hopewell Township v. DEP*, 1996 EHB 956, 970 (an abuse of discretion is shown if the Department failed to consider dust and noise or if the problems rise to the level of a public nuisance).

[39] Act of July 31, 1968, P.L. 805, *as amended,* 53 P.S. §§ 10101-11107.

[40] 1996 EHB 956.

[41] *Id.* at 972-73.

[42] See Notice of Appeal Obj. 23.

hearing.[43] The noncoal regulations require the Department to hold "informal hearings" if requested, but these are not intended to be full due process hearings.[44] The Commonwealth Court has specifically held that an appellant is not deprived of due process where the Department holds no hearing, when the appellant has been heard by the Board.[45] However, the Permittee has not moved for summary judgment on this contention, but simply responded to the Township's allegation in its response.[46]

We therefore enter the following:

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[43] 35 P.S. § 7514(c) (the Department may take an action initially without regard to Chapter 5 Subch. A of the Administrative Agency Law, relating to hearings.)

[44] 25 Pa. Code § 77.123.

[45] *Morcoal Co. v. Department of Environmental Resources,* 459 A.2d 1303 (Pa. Cmwlth. 1983); *Department of Environmental Resources v. Steward*, 357 A.2d 255 (Pa. Cmwlth. 1976).

[46] *Exeter Township v. DEP*, 2000 EHB 630 (the Board may not enter summary judgment on behalf of a party who did not move for summary judgment.)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LOWER MOUNT BETHEL TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2003-013-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EASTERN INDUSTRIES, INC.	:	

ORDER

AND NOW, this 26th day of January, 2004, upon consideration of Eastern Industries, Inc.'s motion for partial summary judgment, IT IS HEREBY ORDERED as follows:

1. Eastern Industries' motion as to Objection No. 6 of Lower Mount Bethel Township's notice of appeal is **GRANTED**;
2. Eastern Industries' motion as to Objection No.14 relative to consideration of the permit application by the Lehigh Valley Planning Commission, the Pennsylvania Historical and Museum Commission and the Northampton County Conservation District is **GRANTED**. To the extent the Township's objection relates to consideration by other agencies, Eastern Industries' motion is **DENIED**;
3. Eastern Industries' motion is **DENIED** in all other respects.

ENVIRONMENTAL HEARING BOARD

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Chairman

GEORGE J. MILLER
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Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: January 26, 2004

c: **DEP Bureau of Litigation**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

RAG CUMBERLAND RESOURCES LP and RAG EMERALD RESOURCES LP	:	
v.	:	**EHB Docket No. 2003-067-L (Consolidated with 2003-068-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and UNITED MINE WORKERS OF AMERICA, Intervenor	:	**Issued: January 27, 2004**

OPINION AND ORDER
ON MOTIONS FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis:

Section 228(a) of the Pennsylvania Bituminous Coal Mine Act, 52 P.S. § 701-228(a), unambiguously requires preshift examinations timed for each shift entering a mine. A shift is a distinct subset of workers regularly scheduled to work at a distinct time.

OPINION

RAG Cumberland Resources LP ("Cumberland") operates an underground coal mine known as the Cumberland Mine in Whitely Borough, Greene County. The mine operates three primary production shifts a day, seven days a week. About 100 workers normally enter the mine at the beginning of these shifts. The shifts start at 7:00 a.m., 3:00 p.m., and 11:00 p.m. Cumberland conducts preshift safety examinations within the three-hour window prior to the beginning of those shifts.

Cumberland also regularly scheduled workers to enter the mine at times that do not coincide with the start times for the primary production shifts. For example, Cumberland started eight workers at 8:00 a.m., Monday through Saturday, and 48 workers at 9:00 a.m., Monday through Saturday. The key, undisputed fact in this appeal is that Cumberland did not conduct separate preshift examinations specific to the workers going into the mine at those odd times. Rather, Cumberland believed that the preshift examinations for the primary production shifts (7:00, 3:00, and 11:00) covered the miners going into the mine at the various odd times. In other words, the preshift examination for the 7:00 a.m. to 3:00 p.m. shift was effective for any other miners entering the mine at any other time between 7:00 and 3:00 in Cumberland's view.

Whether the Department was aware of Cumberland's examination schedule and whether it objected to it are questions that appear to be disputed. In any event, on March 18, 2003, the Department issued a compliance order citing Cumberland for failing to conduct preshift examinations for the workers going into the mine at odd times. Cumberland's appeal at Docket No. 2003-067-L is from that order.

RAG Emerald Resources LP ("Emerald") operates an underground coal mine known as the Emerald Mine in Franklin Township, Greene County. The pertinent situation presented at Emerald is similar to the situation presented at Cumberland, with some adjustments to the operative starting times. The primary production shifts at Emerald start at 8:00 a.m., 4:00 p.m., and midnight. Emerald conducted preshift examinations during the three-hour window before those start times, but at no other times. Emerald also started 55 workers at 6:30 a.m., Monday through Sunday, and 17 workers at 1:30 p.m., Saturday and Sunday. Emerald did not conduct separate preshift examinations during the three-hour window before the odd starting times. Emerald believed that those workers were covered by the examinations that were timed to coincide with the primary production shifts. The Department disagreed, and issued an order

citing Emerald for failure to conduct preshift examinations before starting workers at the odd hours. Emerald's appeal from that order is docketed at EHB Docket No. 2003-068-L.[1]

The Department has moved for summary judgment in both appeals.[2] Although the Department asks for dismissal of the appeals, the motions do not appear to address all of the issues raised in the notices of appeal. (*See, e.g.,* Section 2, ¶ ¶ 2(e) and (f).) We will, therefore, treat them as motions for partial summary judgment. The United Mine Workers of America ("UMW") filed a statement as an intervenor in support of the Department's position. Cumberland and Emerald (hereinafter sometimes referred to collectively as "Cumberland") oppose the motions.

The only issue that is before us is whether Cumberland violated the Pennsylvania Bituminous Coal Mine Act ("BCMA"), 52 P.S. § 701-101 *et seq.*, by failing to perform preshift examinations during the three hours prior to sending miners into the mine at the odd starting times. Stated from the opposite perspective, we must decide whether a preshift examination for a primary production shift is sufficient to cover all workers entering the mine at any time during the pendency of the time period covered by that shift.

Cumberland has not in either the notices of appeal or in the response to the Department's motions disputed the material facts that are set forth in the orders. Instead, the parties' dispute concerns the meaning of Section 228(a) of the BCMA. The pertinent parts of that statute read as follows:

> (a) In a gassy mine, within three hours immediately preceding the beginning of a coal-producing shift, and before any workmen in such shift, other than those who may be designated to make the examinations prescribed in this section, enter the

[1] The Board *sua sponte* consolidated Cumberland's and Emerald's appeals due to the similarity of the facts and legal issues presented in the two appeals.

[2] The Board may grant summary judgment where the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. 25 Pa. Code § 1021.73; Pa. R.C.P. 1035.2.

> underground areas of such mine, certified persons designated by the mine foreman of such mine to do so shall make an examination, as prescribed in this section, of such areas.
>
> * * *
>
> No person on a non-coal producing shift (other than a certified person designated under this paragraph) shall enter any underground area in a gassy mine, unless such area, which shall include all places on that particular split or air, has been examined as prescribed in this subsection within three hours immediately preceding his entrance into such area.

52 P.S. § 701-228(a).[3]

Cumberland's position is that Section 228(a) only requires examinations within the three hours preceding the beginning of the primary coal-producing shifts. In other words, mines such as Cumberland's really only have three "shifts." If there are only three shifts, it follows that three examinations are adequate.

The fundamental flaw with Cumberland's argument is its assumption that there can only be one shift working at any one time; that there can be no overlapping shifts. Overlapping shifts, however, are commonplace in all manner of businesses. There is nothing whatsoever that is unusual, for example, about maintenance crews working different hours than production crews, or overlapping production crews for that matter. Indeed, we suspect it is the rare large business where every single worker leaves at the same time to allow a 100 percent turnover to the next group of workers. We see nothing in the statute or the record to support the counterintuitive notion that there can only be one "shift" working at any one time in a coal mine.

Once we accept the commonsensical idea that there can be multiple, overlapping shifts working at any one time, there is no basis to conclude from the statute or otherwise that an examination for one shift can or should necessarily suffice for another shift. If the shifts are close enough in time, one examination might coincidentally suffice for multiple shifts, but there

[3] There is no dispute that the Cumberland and Emerald Mines are "gassy mines."

is nothing to suggest that an inspection for one shift should automatically cover *any* overlapping shift, regardless of the difference in starting times.

The Department argues that the term "shift" in Section 228(a) refers to the group of miners who are regularly scheduled to work a particular block of time. Cumberland counters that the term "shift" only refers to a block of time. In truth, the term "shift" incorporates both ideas. It refers to *both* the period of time and the workers who work in that period of time. The reference to a block of time without reference to workers scheduled to work that time would not be a shift. A reference to a group of workers who do not share a common assigned start time would not be a shift. It takes both a distinct set of workers and a distinct set of hours to create what would fairly be called a "shift." For example, the space of 8:00 to 4:00 on the clock is meaningless unless it refers to a set of workers who work within that period. If workers at an establishment start at 10:00 and leave at 6:00, there is no 8:00 to 4:00 "shift" at that establishment. There must be a group of workers assigned to work a given period of time for that period of time to be a shift. The eight hours between 8:00 and 4:00 at our hypothetical establishment do not constitute a shift because nobody works those hours. Conversely, a group of workers does not constitute a shift unless those workers all work the same hours. Even if ten miners do the exact same job and have everything in common except the hours they work, they are not part of the same shift. If some miners are assigned to start at 7:00 and some start at 9:00, they do not together constitute one shift. A shift is defined by a distinct subset of workers working at a distinct, regularly scheduled time. Without both elements, there is not a shift. It is no more appropriate to define a shift by blind reference to only a distinct group of workers than it is by blind reference to a distinct time period.

Thus, in *United Mine Workers of America v. DEP ("UMW")*, 2001 EHB 1040, *aff'd*, 22 C.D. 2002 (Pa. Cmwlth. November 14, 2002), we mentioned a change in the rules promulgated

under the Federal Mine Health and Safety Act, 30 U.S.C. § 801-962. The federal rules were revised to provide that safety examinations are to be conducted on regular eight-hour intervals instead of three hours before the start of each shift. Because the examinations under the new approach were tied to blocks of time without consideration of whether a group of miners worked those blocks of time, it was no longer appropriate to refer to the examinations as "preshift" examinations. Under the rule change, the examinations are now referred to as "eight-hour interval examinations." *UMW*, 2001 EHB at 1050-51. This change illustrates that it takes a group of workers working a designated period of time to constitute a shift. A period of time alone is simply an "interval."

We do not detect any material ambiguity in the statute even if we refer to the dictionary. The WEBSTER'S NEW COLLEGIATE DICTIONARY defines shift as follows:

> **4a:** a group of people who work or occupy themselves in turn with other groups **b(1):** a change of one group of people (as workers) for another in regular alternation (2): a scheduled period of work or duty

The Department tells us that the DICTIONARY OF MINING, MINERAL AND RELATED TERMS, Department of Interior (1968), defines the term "shift" to mean "[t]he number of hours or the part of any day worked. Also called 'tour'" or '[t]he gang of men working for the period; as, the day shift or the night shift." It is readily apparent from a review of these definitions that, regardless of whether the definition focuses on the workers or the period of time, without both components, it is not a shift. It is, for example, (1) the "number of hours" (2) "worked." Alternatively, it is (1) the "gang of men working" (2) "for the period." The definitions incorporate both components.

Even if we assume, for purposes of discussion, that the term "shift" in Section 228(a) is ambiguous, it does not change the result. It does not matter whether one focuses on the subset of miners or the subset of time. If we consider that a group of 100 workers occupy themselves at

one time and another group of 8 workers occupy themselves at another time, we cannot see how two sets of workers can be referred to as part of the same shift. If we consider that a distinct group starts 7:00 and another starts at 8:00, they are still two separate groups.

Viewing this question yet another way, if one focuses on blocks of time, we fail to see why it would be appropriate to pick the three primary production shifts and contend that the several other starting times "do not count." Would the basis for selecting the three main shifts be that they are "coal-producing?" The statute on its face applies to both coal- and non-coal producing shifts. Would the basis be that more miners work on those shifts than the other shifts? Again, there is nothing in the statute to suggest that only shifts with the most workers trigger the preshifting requirement. In short, given the panoply of start times, it is arbitrary, or at least without statutory basis, to pick among them for purposes of the preshift examination requirement.

In light of this discussion, Cumberland and Emerald obviously have more than three shifts at their mines. The 100 or so miners scheduled to begin at 7:00 cannot be said to be part of the same shift as the eight miners who are regularly assigned to start work at 8:00. The eight workers going in at 8:00 are distinct whether one looks at the list of individuals involved or the period of time that they work. Whether one chooses to focus on the workers or the period of time, it is clear that there are two distinct, albeit overlapping, shifts.

We are not aware of anything in the BCMA that prohibits a company from scheduling multiple, overlapping shifts. Cumberland explains, and we do not doubt, that there are good economical and practical reasons for doing so. If a company employs that approach, however, Section 228(a) unambiguously mandates that there be a comprehensive examination within three hours before each coal-producing shift and a more directed examination before each non-coal-producing shift. One examination may theoretically suffice if multiple shifts are close in time,

but it does not necessarily suffice merely because the shifts overlap. An examination between 4:00 and 7:00 for a 7:00 shift does not suffice for a separate group of workers regularly scheduled to start at 10:00.

Of course, a key component of a shift is regular scheduling. Thus, an unscheduled emergency crew is not a shift for purposes of Section 228(a). An unusual situation requiring a miner to leave a mine and re-enter does not create a new shift. An employee who only occasionally and irregularly goes into the mine does not constitute a shift. Someone showing up late is not a shift. The fact that it can take some time to get everyone on the same crew into or out of a mine does not create multiple shifts.

There is no logical reason to put limits on the size of a shift. If one miner regularly works a number of hours distinct from all other employees, that miner may work his own "shift." Conversely (albeit unrealistically), if 500 miners always work one hour, they may constitute a separate "shift."

We also do not intend to suggest that, beyond being regularly scheduled, either the number (or identity) workers or the number of hours need to be static. A company decision to double the workforce working from 7:00 to 3:00 does not change the fact that there is a 7:00 to 3:00 shift. A decision to leave the number of workers the same but change the hours from 7:00 to 3:00 to 7:00 to 4:00 changes the definition of the shift but it does not change the fact that there is a distinct shift.

Although the Board recently dealt with preshift examinations in *UMW, supra*, 2001 EHB 1040, that case did not resolve the issue presented here; namely, whether staggered shifts can be covered by the same preshift examination.[4] Nevertheless, Cumberland's argument that a preshift

[4] Fundamentally, this case addresses what the statute says, not the issue in *UMW*, which was whether a variance from that statutory requirement was appropriate. It is true that we stated in *UMW* that "[u]nder Section 228(a) this system of advanced notice of potentially dangerous conditions [afforded by preshift

examination for miners entering the mine at 7:00 is adequate for other miners entering the mine up to eight hours later is certainly inconsistent with the spirit, if not the letter, of our holding in *UMW*. The Board in *UMW* spoke generally about the importance of the proximity in time between the examinations and the entry of new workers into the mine. *See, e.g.,* 2001 EHB at 1083-91. Cumberland's suggested approach in this case has the very same effect that the prohibited variance had in *UMW*; namely, sending miners "into the mine without any preshift examination having been done within the three hours immediately prior to the commencement of their shifts." 2001 EHB at 1087.[5]

The parties argue about our need to defer to the Department's interpretation. We detect no ambiguity of any significance in Section 228(a). The section unequivocally requires preshift examinations for coal-producing and non-coal-producing shifts. As discussed above, the effort to define shift as having two different, separate meanings is artificial. Whether one defines a shift by reference to the workers or the period of the time that they work, the fact remains that separate groups of workers and/or separate blocks of time cannot be viewed as the same shift.

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examinations] applies to *each* shift of miners before they descend into the mine to start their shift." 2001 EHB at 1065 (emphasis added). We also referred at some places in the opinion to the various crews entering the mine at different times as separate shifts. *See, e.g.,* 2001 EHB 1065-67, 1088, 1090. But it cannot be fairly said that the Board intended to resolve the issue that is squarely presented here.

The parties in *UMW* disagreed about the actual number of inspections required by state law at the mine at issue. Had the Board resolved that question, it might have had the effect of answering the question that is presented here. Instead, the majority of the Board did not find that it was necessary to determine the gross number of examinations required under state law in order to resolve the issues presented in *UMW*. 2001 EHB 1084-85.

It is worth mentioning that, unlike the UMW, the Department appears to have taken a position in *UMW* that is the opposite of its position here. By reference to the Department's argument regarding the number of shifts that required examinations, 2001 EHB at 1111, it appears that the Department believed in *UMW* that, for example, maintenance shifts starting in the middle of coal-production shifts did not require separate inspections. A preshift examination between 3:00 and 6:00 a.m. appeared to suffice for the Department, not only for a production crew starting at 6:00, but a maintenance crew that did not start until 8:00. There was no separate examination required for the 8:00 shift in the Department's view. To repeat, however, the Board did not decide the precise issue that is presented here. *See* 2001 EHB at 1057 n.3.

[5] Cumberland's contention that *UMW* stands for the proposition that a mine need only be examined before a coal-producing shift is simply wrong. *See* 2001 EHB at 1084 (examinations before coal-producing and non-coal-producing shifts).

Where a statute is clear, that is no need to engage in interpretation. Pa. C.S.A. § 1921(b) & (c); *Eagle Environment, L.P. v. DEP*, 833 A.2d. 805, 808 (Pa. Cmwlth. 2003).

Cumberland and Emerald argue that a literal reading of the statute results in too many examinations. They argue that a literal reading results in some rather strange results.[6] They complain that the statute could require an examination for even one separately scheduled worker and that such a result is unreasonable. They point out that a modern mine almost always has workers in it but the statutory requirement focuses all of the attention on miners entering the mine. They complain than the statutory requirement is inconsistent with current and historical industry practice. Even if these allegations are true, they are arguments to be made to the Legislature, not us. It is not our role to revise or update the statute. Our responsibility is to discern the legal meaning of the statute as written. We simply detect no ambiguity whatsoever in this statute.

Accordingly, we enter the order that follows.

[6] For example, three production workers are sent out of the mine to retrieve a replacement part. They get the part, and happen to ride the same elevator down as some workers just starting their maintenance shift, all of whom will be working in the same area of the mine. An inspection is required for the fresh starters but not the production workers returning with the replacement part.

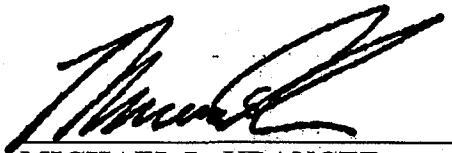
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RAG CUMBERLAND RESOURCES LP and RAG EMERALD RESOURCES LP	:	
v.	:	**EHB Docket No. 2003-067-L (Consolidated with 2003-068-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and UNITED MINE WORKERS OF AMERICA, Intervenor	:	

ORDER

AND NOW, this 27th day of January, 2004, in consideration of the Department's motions for summary judgment and the responses in support and in opposition thereto, it is hereby ordered that the objections set forth in Paragraphs (2)(a)-(d) in Cumberland and Emerald's notices of appeal are dismissed. Within ten days, the parties shall submit a proposed case management order that addresses the further management of this appeal.

ENVIRONMENTAL HEARING BOARD



MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: January 27, 2004

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

MARK M. STEPHENSON	:	
	:	
v.	:	**EHB Docket No. 2003-142-R**
	:	**(Consolidated with 2003-255R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
	:	**Issued: January 27, 2004**

OPINION AND ORDER
ON MOTION TO COMPEL

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Appellant's motion to compel is granted in part. Where the Department refers to interpretations in its Technical Guidance Manual in response to interrogatories asking for the definition of certain terms, it has sufficiently answered the Appellant's questions. However, where it is not clear that the Department's answers have sufficiently explained how it arrived at these interpretations, it will be required to supplement its answers.

O P I N I O N

Introduction

The appellant, Mark M. Stephenson, applied to the Department of Environmental Protection (Department) for a permit for construction of a gas well to be known as the Dodson Hill No. 1 well. The Department concluded that a workable coal seam exists at the proposed well

site and required Mr. Stephenson to comply with the well spacing requirements of Section 7 of the Coal and Gas Resource Coordination Act, Act of December 18, 1984, P.L. No. 1069, as amended, 58 P.S. §§ 501-518, at § 507. The Department reached this conclusion after making a determination that the Lower Kittanning coal seam exists at the site of the Dodson Hill No. 1 well in a thickness of at least 28 inches and with an overburden of at least 100 feet. The Department denied the permit application when Mr. Stephenson did not show that the proposed gas well met the spacing requirements of Section 7 of the Coal and Gas Resource Coordination Act. Mr. Stephenson's appeal of the Department's denial centers in part on the reasonableness of the Department's judgment that a coal seam exists at the well site, whether the Department can reasonably expect the seam to be mined by underground methods, what the proper test is for application of the Section 7 spacing requirement and whether that test was properly applied in this case.

Based on the aforesaid grounds of appeal, Mr. Stephenson propounded a series of interrogatories asking how the Department defines certain words and phrases, including "reasonable," "reasonably," "expect," "expectation," "expected," "reasonably expected," "reasonable expectation" and "coal" and to state all facts or theories supporting its answer as well as to identify all documents containing such support. The Department objected to these interrogatories on the grounds they do not seek relevant information and that they were unduly burdensome. The Department also contended that these questions were answered in its Technical Guidance Document on Oil and Gas Well Drilling Permits and Related Approvals (Technical Guidance Document).

Motion to Compel

On December 22, 2003, Mr. Stephenson filed a motion to compel. The Department filed

an answer objecting to the motion on a number of grounds. First, the Department contends that it did not deny the permit application based on the aforesaid words but on a judgment that the proposed well location is underlain by a coal seam that can reasonably be expected to be mined by underground methods. In making this judgment, the Department states that it relied on its Technical Guidance Document. According to the Department, the Technical Guidance Document sets forth three tests for determining the existence of a workable coal seam, at least one of which was met by Mr. Stephenson's proposed well location. Second, the Department denies that it can add anything of relevance to the answers already provided to Mr. Stephenson by defining these terms. The Department further adds that it is not aware that these words carry any specialized meaning in the context of the definition of "workable coal seam" in the Oil and Gas Act, Act of December 19, 1984, P.L. No. 1140, 58 P.S. §§ 601.101 – 601.605. Finally, the Department contends that the specific interrogatories objected to are not intelligible.

Discussion

Discovery in proceedings before the Board is governed by the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). A party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. Pa. R.C.P. 4003.1(a).

In his motion to compel, Mr. Stephenson asserts that unless the Department defines the aforesaid terms, he cannot know what constitutes a "coal seam reasonably expected to be mined." The Department responds that it made this judgment based not on the words and terms sought to be defined by Mr. Stephenson, but on the Technical Guidance Manual's interpretation of "workable coal seam." To that extent, the Department contends that these words and phrases are not relevant to the matter at hand. It further contends that to the extent these words need to be

defined, they were answered in the deposition of David Janco, Regional Manager of the Department's Southwest Region Bureau of Oil and Gas Management.

We agree with Mr. Stephenson that his interrogatories are relevant to this appeal. In its answer, the Department stated that it "denied the Dodson Hill Well permit application based not on these words but on a *judgment* that the proposed well location is underlain by a coal seam that *can reasonably be expected to be mined by underground methods*." (Department's Answer, p. 5. Emphasis added) Therefore, understanding how the Department defines "reasonably" and "expected" and all terms related thereto is relevant to the subject of this appeal.

However, it appears to the Board that the Department has answered that question by referring Mr. Stephenson to its Technical Guidance Document. We understand the Department's answer to the question of how it defines "reasonably" and "expected" and all related terms to be the criteria set forth in its Technical Guidance Document. In its Technical Guidance Document, it states that gas wells are subject to spacing, distance and casing requirements under the Oil and Gas Act and the Gas Resources Coordination Act if the location meets certain criteria, including where it overlays a coal seam at least 28 inches thick with at least 100 feet of overburden. The Department considers a seam meeting these criteria to be one that can "reasonably be expected" to be mined. It contends that the proposed location of the gas well in this appeal meets the criterion of at least 28 inches of thickness with at least 100 feet of overburden.

Thus, we consider the Department to have answered the question of what it considers to be a "workable coal seam" or one that can "reasonably be expected" to be mined. Likewise, we consider it to have defined the terms "reasonable" and "expected" and all derivatives thereof. However, the Technical Guidance Document does not set forth how the Department arrived at this definition and, therefore, to the extent Mr. Stephenson's interrogatories seek this information

we will require the Department to answer it. If the Department believes that Mr. Janco's deposition has already answered this question, it may respond to Mr. Stephenson's interrogatories by referring to the specific pages of Mr. Janco's testimony that it believes provide a response thereto.

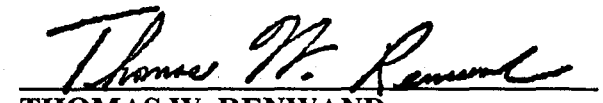
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARK M. STEPHENSON	:	
	:	
v.	:	**EHB Docket No. 2003-142-R**
	:	**(Consolidated with 2003-255-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 27th day of January, 2004, the Department is ordered to respond to Mr. Stephenson's interrogatories as set forth in this Opinion on or before February 10, 2004.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administration Law Judge
Member

DATE: January 27, 2004

c: **DEP Bureau of Litigation:**
Attention: Brenda Houck, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

MORRIS TOWNSHIP PROPERTY OWNERS, and MORRIS TOWNSHIP CITIZENS NANCY SMITH, DANIEL C. PIELMEIER, DAVID L. LILLIE, JUDITH M. SMITHMYER, CHARLES F. SMITH, TRACY LILLIE and DANIEL P. SMITHMYER, Appellants	**: EHB Docket No. 2003-183-MG : (consolidated with EHB : No. 2003-184-MG)**
v.	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROBINDALE ENERGY SERVICES, INC., Permittee	**: Issued: February 13, 2004**

OPINION AND ORDER ON MOTION FOR PROTECTIVE ORDER

By George J. Miller, Administrative Law Judge

Synopsis

The Board denies in part, and grants in part a motion for protective order filed by the Department in response to an appellant's request to depose the Department's counsel. The motion is denied as it relates to a conversation that Department counsel had with a representative of the permittee during the Department's consideration of the permittee's permit application and observations he may have made at the site. However, we will grant the motion to the extent the appellant seeks discovery of legal advice that Department counsel provided to departmental personnel for their use in making a determination on the permittee's application.

OPINION

The motion before the Board derives from an appeal from the Department's issuance of a surface mining permit to Robindale Energy Services, Inc. (Permittee) in July 2003. The Appellants, an association and several individuals, objected to the issuance of the permit on several grounds, including alleged irregularities in the landowner consents related to a water line and whether water supplies are adequately protected by the terms of the permit. On the last day of discovery, the Appellants served three notices of deposition, including one directed to the Department's counsel, Craig Lambeth. The Appellants contend that at some point during the permitting process, Mr. Lambeth undertook an investigation, which at some point involved a conversation with an attorney of the Permittee. The Department does not deny that such an investigation and conversation took place, but argues that Mr. Lambeth's deposition would necessarily reveal information protected by attorney-client privilege and the work product doctrine. The Appellants dispute this claim and argue that they are entitled to discovery of matters leading up to the issuance of the permit, and to the extent that Mr. Lambeth participated in that process, information he may offer is discoverable.

We summarized the law of attorney-client privilege in our decision in *Defense Logistics Agency v. DEP*:[1]

> The attorney-client privilege is not only a time-honored tradition in American jurisprudence, but is considered important enough to be codified in the Pennsylvania Judicial Code:
>
> > In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.

---

[1] 2000 EHB 1218, 1219-20.

42 Pa. C.S. § 5928. Although the privilege is in derogation of the truth-seeking function of a tribunal, the protection of the confidences between a client and his lawyer nevertheless served a vital function in our judicial system:

> The purposes and necessities of the relation between a client and his attorney require, in many cases, on the part of the client, the fullest and freest disclosures to the attorney of the client's objects, motives and acts. The disclosure is made in the strictest confidence, relying upon the attorney's honor and fidelity. To permit the attorney to reveal to others what is so disclosed, would be not only a gross violation of a sacred trust upon his part, but it would utterly destroy and prevent the usefulness and benefits to be derived from professional assistance. Based upon considerations of public policy, therefore, the law wisely declares that all confidential communications and disclosures, made by a client to his legal adviser for the purpose of obtaining his professional aid or advice, shall be strictly privileged . . . .

Slater v. Rimar, Inc., 338 A.2d 584, 589 (Pa. 1975)(quotation omitted). This privilege is important not only to individuals, but to government entities as well. Accordingly, it is well settled in Pennsylvania law that the attorney-client privilege applies to governmental agencies and their lawyers who are acting in their professional capacities. *Sedat, Inc. v. Department of Environmental Resources*, 641 A.2d 1243 (Pa. Cmwlth.1994); *Okum v. Unemployment Board of Review*, 465 A.2d 1324 (Pa. Cmwlth. 1983). Specifically, government entities "may claim the privilege for communications between their attorney and their agents or employees who are authorized to act on behalf of the entities." *Gould v. City of Aliquippa*, 750 A.2d 934, 937 (Pa. Cmwlth. 2000).

Additionally, the Commonwealth Court has explained that privilege applies to Department attorneys as it does to their private counterparts, rejecting the perceived exception to the privilege for when a government lawyer participates in the "adjudicatory" process:

> While it is true that when an attorney is the decision-maker, as opposed to legal counsel giving advice to the decision-maker, the attorney-client privilege does not apply. However, when the attorney merely gives legal advice to decision-makers, his advice can be rejected, so that it does not rise to the level of policy and retains its privileged nature.[2]

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[2] *Sedat, Inc. v. Department of Environmental Resources*, 641 A.2d 1243, 1245 (Pa. Cmwlth. 1994). The Appellants urge us to disregard this decision inasmuch as it is a single

However, we are also mindful that privileges are to be narrowly construed.[3]

First, we do not believe that the conversation between Mr. Lambeth and the Permittee's counsel falls within the ambit of attorney-client privilege. The privilege only attaches to communications which are confidential.[4] Generally, information provided to a third person who is not part of the confidential relationship between attorney and client, does not remain privileged.[5] The Department has not described any circumstances surrounding the conversation with a person not his client which suggests that the conversation was meant to be confidential. The mere fact that one of the participants in the conversation happened to be an attorney does not automatically protect the conversation from discovery.[6]

Similarly, any observations at the site that Mr. Lambeth made during the course of his investigation are not privileged. Such observations do not fall within the ambit of a confidential communication protected from discovery.[7]

Although the Appellants early in their response to the motion for protective order state broadly that they don't know what the conversation was about, they do articulate a specific area into which they wish to inquire: information relating to the protection of water supplies and information relating to a water line which crosses the mine site. The Appellants have

---

judge opinion. We have no reason to believe that if the matter were brought before a panel of the court that it would reach a different decision. Accordingly, we find Judge Pellegrini's decision to be highly persuasive and decline to ignore it or reach a different conclusion.

[3] *See Joyner v. SEPTA*, 736 A.2d 35.

[4] 42 Pa. C.S. § 5928.

[5] *See Adhesive Specialists Inc. v. Concept Sciences, Inc.*, 59 D &C 4th 244 (Lehigh 2002).

[6] *See Okum v. Unemployment Compensation Board of Review*, 465 A.2d 1324 (Pa. Cmwlth. 1983).

[7] *See National Railroad Passenger Corp. v. Fowler,* 788 A.2d 1053, 1064 (Pa. Cmwlth. 2001)(the protection of attorney-client privilege does not extend to the facts.)

further represented that if the conversation between the Department and the Permittee was related to another topic, then it will inquire no further.[8] Accordingly, we will allow the Appellants limited discovery from Mr. Lambeth on those two topics if either was discussed in his conversation with the Permittee's attorney.

However, we do not believe that the Appellants have sustained their burden of demonstrating that communications from the Department's technical personnel seeking Mr. Lambeth's advice as their counsel are not protected by privilege.[9] Nor have the Appellants adequately demonstrated any reason why that privilege should be breached.

None of the cases cited by the Appellants require a different result. *Sedat* clearly held that legal advice provided by counsel to Department staff is protected by attorney-client privilege in the same way that it would be if the communications were among private individuals and their attorney. Board decisions which allowed deposition of attorneys were permitted because the attorney was listed as a trial witness or was involved in the matter in such a way that he was likely to be listed as a fact witness.[10] None of these cases involved Department attorneys whose legal advice had been sought. The investigation undertaken by Mr. Lambeth is not unlike the investigation at issue in *Gould v. City of Aliquippa*.[11] In that recent decision a panel of the Commonwealth Court held that an attorney's interviews of City

---

[8] Appellants' Response at 7.

[9] *Defense Logistics Agency v. DEP*, 2000 EHB 1218, 1223 (burden of proof is upon the party asserting that the disclosure of information would not violate the attorney-client privilege).

[10] *DER v. CSX Transportation, Inc.*, 1995 EHB 1395 (deposition of counsel who verified answers to interrogatories and was likely to be called as a fact witness was allowed); *Snyder v. DER*, 1991 EHB 1395 (deposition allowed of an attorney listed as a fact witness in pre-hearing memorandum); *New Hanover Corp. v. DER*, 1991 EHB 1185 (deposition of appellant's counsel permitted where that counsel was heavily involved in the appellant's efforts to secure a permit and was likely to be called as a fact witness).

[11] 750 A.2d 934 (Pa. Cmwlth. 2000).

employees taken in the course of his defense of the City in a civil action was protected by attorney-client privilege.

Finally, our recent decision in *Defense Logistics* is not inconsistent with our holding here. In that case, an enforcement action, Department counsel was privy to many confidential meetings and conversations which involved negotiations and a complex enforcement action involving the federal government. There was no allegation that some of these conversations were not confidential. The discovery request by opposing counsel was very broad, and unlike the request as characterized by the Appellants' motion response, did not focus on one particular meeting or aspect of the appeal. Accordingly, deposition of Department counsel in that case was properly barred.

We therefore enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MORRIS TOWNSHIP PROPERTY OWNERS, and MORRIS TOWNSHIP CITIZENS NANCY SMITH, DANIEL C. PIELMEIER, DAVID L. LILLIE, JUDITH M. SMITHMYER, CHARLES F. SMITH, TRACY LILLIE and DANIEL P. SMITHMYER, Appellants	:	**: EHB Docket No. 2003-183-MG : (consolidated with EHB : No. 2003-184-MG)**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROBINDALE ENERGY SERVICES, INC., Permittee	:	

ORDER

And now, this 13th day of February, 2004, the motion of the Department of Environmental Protection for Protective Order is hereby denied in part and granted in part:

1. The motion is denied as to a conversation between Craig Lambeth, Esq. and counsel for Robindale Energy Services, Inc. to the extent the topic of protection of the water supplies and concerning the water line which crosses the mine site may have been discussed. The motion is also denied as to any observations Mr. Lambeth may have made at the site during the course of his investigation.
2. The motion as to the deposition of Craig Lambeth is granted in all other respects.

3. This limited discovery shall not include disclosure of the mental impressions, opinions, memoranda, notes or summaries, legal research or legal theories of Mr. Lambeth.

4. Counsel shall inform the Board of the date and time that the deposition of Mr. Lambeth is scheduled. In the event that disputes arise at the deposition concerning the scope of this order, counsel should contact the Board for a conference call.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Member

DATED: February 13, 2004

c: **DEP Bureau of Litigation:**
Attention: Brenda Houck, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DEFENSE LOGISTICS AGENCY, DEPARTMENT OF THE ARMY, AND DEFENSE SUPPLY CENTER PHILADELPHIA, Appellants	:	
v.	:	**EHB Docket No. 2000-004-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, Appellee and THE PHILADELPHIA HOUSING AUTHORITY, Intervenor	:	**Issued: February 23, 2004**

OPINION AND ORDER UPON REMAND FROM COMMONWEALTH COURT TO CONSIDER AMENDMENT OF ADJUDICATION

By Michael L. Krancer, Chairman

Synopsis:

Pursuant to a remand order by the Commonwealth Court, the Board amends its adjudication in *Defense Logistics Agency v. DEP*, 2001 EHB 1215.

Factual & Procedural Background

We have before us a singular situation. We issued an adjudication in this case on December 21, 2001. *Defense Logistics Agency (DLA) v. DEP*, 2001 EHB 1215. The losing appellant appealed our adjudication to the Commonwealth Court. Before the Commonwealth Court ruled on the appeal, the parties were able to reach a settlement. They filed with Commonwealth Court a "Joint Motion In Aid of Settlement To Lift Stay And To Modify An Adjudication Of The Environmental Hearing Board". The Commonwealth Court responded by

issuing an order remanding the matter to the Board for us "to *consider* the parties' desire to modify the Board's adjudication consistent with the parties' settlement agreement..." (emphasis the Court's).

Obviously, we do not and would not normally modify an adjudication based solely on the parties' desire that we do so. However, we have reviewed the record of the case very carefully in light of the invitation and mandate by the Commonwealth Court to do so and we are of the view that a unique combination of unpredictable and inimitable considerations and circumstances have coalesced here which convince that the interests of justice would be served by our accepting the invitation of the Commonwealth Court to amend our adjudication.

We will not re-recite in detail the factual background of this matter as it is fully set forth in our December 21, 2001 adjudication. Put very simply, DLA challenged the Department's issuance of a 1999 order requiring DLA to take certain steps regarding contamination under and in the very near vicinity of DLA's property. The crux of the problem we are directed to look at today is that the parties believe that our adjudication contains two erroneous references which could be interpreted as substantive findings of fact regarding the actual source of or cause of the contamination addressed in the Department Order under appeal. What makes that a problem is that the Department's basis for issuing the order as well as the subject of the appeal was not who or what was responsible for the contamination in terms of who caused the contamination but whether the Order was necessary and proper under the theory of strict liability of the DLA as landowner.

The trial record does show that the Department's theory of the case was not that DLA was the source of the contamination or that it caused the contamination. Instead, its theory was much simpler. Its theory was that DLA owned the property in question and was liable not on

account of any action or activity on its part but solely on the basis of its status as the landowner. DLA's trial defenses did not relate to any action or inaction on its part regarding the contamination. Instead, it argued that: (1) dispute resolution processes of a consent order should have been used; (2) that the order was contrary to an enforcement policy of the Department; and (3) that the Department showed bias and prejudice against DLA in issuing the order to it only and not to another party as well.

DEP presented some evidence at trial which touched on the subject of the source of the contamination. This evidence on the subject of source was heard and admitted solely to show what the Department had in mind so as to counter a contention by DLA, which contention had, by the way, DLA abandoned after trial, that Department's order was issued out of bias or prejudice against DLA. Even the proponent of that evidence, the Department, agreed that it was offered not for its substantive truth or accuracy but, instead, to show, in essence, the Department's state of mind to counter the allegation of bias and prejudice.

Although it is not completely clear that the Board's adjudication actually makes the substantive factual findings on the subject of source as the parties seem to think it does, their point that certain discreet brief snippets of our adjudication could be interpreted as crossing over into suggesting a finding or conclusion about actual source is not totally out of line. We did not mean to provide any substantive factual conclusion, nor could we have given the litigation posture of the case and the evidentiary ruling we have discussed, regarding the actual source of the contamination addressed in the Department's 1999 Order. Thus, given the myriad of extraordinary factual and procedural circumstances which have converged before us now, we do conclude that we will accept the Commonwealth Court's invitation to amend our adjudication as provided in the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DEFENSE LOGISTICS AGENCY, DEPARTMENT OF THE ARMY, AND DEFENSE SUPPLY CENTER PHILADELPHIA, Appellants	:	
v.	:	**EHB Docket No. 2000-004-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, Appellee and THE PHILADELPHIA HOUSING AUTHORITY, Intervenor	:	**Issued: February 23, 2004**

ORDER

AND NOW, this 23rd day of February, 2004, IT IS HEREBY ORDERED as follows:

1. Finding of Fact 94 (2001 EHB 1215, 1230-31) is hereby modified so it reads in full as follows:

> While the report of the NTE was considered by the Department in deciding to issue the order against DLA alone, the NTE report was not the sole basis for the issuance of the 1999 Order; the Order was also based on independent information described above. (Conrad. N.T. 106-08)

2. That portion of the Board's discussion in the Adjudication on page 25 (2001 EHB at 1239) on lines 1 and 2 beginning with the word "Second" and concluding with a reference to "Finding of Facts 96-104" is hereby deleted from the Adjudication.

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Administrative Law Judge
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DATED: **February 23, 2004**

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SOLEBURY TOWNSHIP, BUCKINGHAM TOWNSHIP, & DELAWARE RIVERKEEPER, DELAWARE RIVERKEEPER NETWORK & AMERICAN LITTORAL SOCIETY	:	
v.	:	**EHB Docket No. 2002-323-K (Consolidated with 2002-320-K & 2003-012-K)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, Permittee	:	**Issued: March 4, 2004**

OPINION AND ORDER ON
APPLICATIONS FOR ATTORNEYS' FEES AND
COSTS UNDER THE COSTS ACT, 71 P.S. §§ 2031 - 2035

By Michael L. Krancer, Chairman

Synopsis:

Applications for attorneys' fees and costs of Appellants Buckingham Township (Buckingham) and Delaware Riverkeeper (Riverkeeper) are denied. Appellants do not come within the prerequisites of the Costs Act in that: (1) there was no "adversarial adjudication" initiated; (2) Appellants were not "prevailing parties"; and (3) since there was no disposition on the merits of the appeal, there is no basis to conclude that the positions of the Commonwealth Agencies were "substantially unwarranted."

Factual and Procedural Background

Before us now are the applications of Appellants Buckingham and Riverkeeper for the recovery of attorneys' fees and costs under the Costs Act, Act of December 13, 1982, P.L. 1127,

71 P.S. §§§2031-2035. (Costs Act). Both DEP and PennDOT oppose the Appellants' applications. The background of this matter has been provided twice before in written Opinions and Orders of the Board and we will not rehearse it here again. *Solebury Township v. DEP*, EHB Docket No. 2002-323-K (Opinion issued January 16, 2004); *Solebury Township v. DEP*, EHB Docket No. 2002-323-K (Opinion issued February 20, 2003). We also have before us, but not ready for decision, at least one petition, and arguably three, for recovery of costs and fees under section 307(b) of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001 (CSL).[1] Because there are different and much more pressing time constraints for briefing and deciding such petitions for recovery of costs under the Costs Act we confine this Opinion and Order to the Costs Act. We will deal separately in a later Opinion and Order with the CSL side of the matter.[2]

Discussion

The general rule within this Commonwealth is that each side is responsible for the payment of its own costs and counsel fees absent bad faith or vexatious conduct. *Lucchino v. DEP*, 570 Pa. 277, 282 (2002); *See also Tunison v. Commonwealth*, 347 Pa. 76, (1943) (*citing*

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[1] We say "arguably" three because two of the appellants, Riverkeeper and Buckingham, filed "supplements" to their petitions under the Costs Act to purportedly include a claim under the CSL. The problem is that the "supplements" came after the 30-day period from the date of the final order of the Board allowed under the Rules for filing petitions for recovery of attorneys' fees and costs. *See* 25 Pa. Code §§ 1021.182(c). PennDOT has moved to strike these "supplements" and the Department of Environmental Protection to dismiss them. PennDOT has argued that those "supplements" should be stricken because, under 25 Pa. Code § 1021.191, in cases where a party is seeking recovery of attorneys' fees and costs under more than one statutory basis, the party "shall file a single application" and this means that "supplements" adding another statutory basis are not allowed. Since, for the reasons described in more detail in footnote No. 2, we are dealing only with the Costs Act and not the CSL in this Opinion and Order, we save those questions regarding the status of Riverkeeper's and Buckingham's putative claims under the CSL for disposition when we deal with the CSL recovery questions in a later Opinion and Order.

[2] The Costs Act requires a decision within thirty days of the filing of the petition. 71 P.S. § 2033(c). Perhaps with that in mind our Rules governing petitions under the Costs Act are set forth in a separate section of our Rules. *Compare* 25 Pa. Code §§ 1021.171 – 1021.174 (Rules governing petitions under the Costs Act) *with* 25 Pa. Code §§ 1021.181 – 1021.184 (Rules governing petitions under statutes *other* than the Costs Act). Under a non-Costs Act petition, the response by the defending party or parties is not even due until 30 days after service of the petition upon it or them. 25 Pa. Code § 1021.183. That is beyond the time that the tribunal under the Costs Act must *decide* the petition under the Costs Act. Hence the need for separate opinions on these separate theories of recovery.

Steele v. Lineberger, 72 Pa. 239, (1872)). *Accord, DEP v. Bethenergy Mines, Inc.*, 563 Pa. 170, (2000). This rule has been modified by several statutes which vest the Board with the ability to award attorneys' fees and costs to the prevailing party in certain actions. The Costs Act is one of those statutes.

Section 3(a) of the Costs Act, 71 P.S. § 2033(a), provides the following:

> (a) Except as otherwise provided or prohibited by law, a Commonwealth agency that initiates an adversary adjudication shall award to a prevailing party, other than the Commonwealth, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer finds that the position of the agency, as a party to the proceeding, was substantially justified or that special circumstances made an award unjust.

71 P.S. § 2033(a).[3] Thus, the following prerequisites must be met before a party may be awarded attorneys' fees and costs under the Costs Act: 1) the agency must have initiated an adversary adjudication; 2) the party requesting the award must be a prevailing party; and 3) there must be a determination that the position of the agency was not substantially justified. *See Reeves v. Pa. Game Commission*, 598 A.2d 605 (Pa. Cmwlth. 1991); S*ee also Messerschmidt v. Pa. State Police*, 782 A.2d 1097 (Pa. Cmwlth. 2001), *appeals denied, Atkins v. Pa. State Police*,

---

[3] Our Rules provide with respect to disposition of applications under the Costs Act as follows:

> The Board will award fees and expenses based upon the application and response if it finds the following:
>
> (1) The applicant is a prevailing party as defined in the Costs Act.
>
> (2) The application presents sufficient justification for the award of fees and expenses.
>
> (3) The action of the Department [of Environmental Protection] was not substantially justified, in that it had no reasonable basis in law or in fact.
>
> (4) There are no special circumstances which would make the award unjust or unreasonable.

25 Pa. Code § 1021.174(b).

568 Pa. 635 (2002). These applications fail on all points to satisfy any of the three parameters of the Costs Act.

"Adversary Adjudication" Requirement

PennDOT argues off the bat that the matter at issue, the Department of Environmental Protection's issuance of a Section 401 Water Quality Certification, is not an "adversary adjudication". We think given the background and announced intent of the Costs Act, that this is correct and, further, that the Costs Act was never meant to apply to cases like this one. The Costs Act's definition of "adversary adjudication" states that it is an "adjudication" as defined in 2 Pa. C.S. § 101. "Adjudication" there is defined as follows:

> Any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities, or obligations of any or all of the parties to the proceeding in which the adjudication is made. The term does not include any order based upon a proceeding before a court or which involves the seizure or forfeiture or property, paroles, pardons or releases from mental institutions.

2 Pa. C.S. § 101. The Costs Act provides that the term "adversary adjudication" does not include an adjudication:

> (1) Establishing or fixing a rate;
>
> (2) Granting, reviewing, revoking or suspending a license or registration;
>
> (3) Resolving disputes concerning the dismissal, suspension, or discipline of any employee of this Commonwealth; or
>
> (4) Involving any criminal charges or allegations of official wrongdoing, corruption, malfeasance or misfeasance.

71 P.S. § 2032.

There is, obviously, a substantial parallel between the term "adversary adjudication," as defined derivatively in the Costs Act, and the definitions of "departmental action" in the Environmental Hearing Board Act and "action" in our Rules. 35 P.S. § 7514(c); 25 Pa. Code §

1021.2. It would not be correct, though, to extrapolate from there that the granting of the Section 401 Water Quality Certification, because it was a "departmental action" under the Environmental Hearing Board Act and an "action" under our Rules is an "adversary adjudication" within the meaning of the Costs Act. There is no initiation by DEP or PennDOT of an adversary adjudication within the meaning of the Costs Act in this case either in a general sense or against the Appellants in particular.

The Costs Act's definition of "adversary adjudication" must be informed by the statement of the Legislature that its purpose in passing the Costs Act was to "deter administrative agencies...from initiating substantially unwarranted actions against individuals [and other entities]". 71 P.S. § 2032(c)(2). We recently observed that the "Costs Act is designed to deter unwarranted actions by a government agency against an individual, business or organization". *Raymond Proffitt Foundation v. DEP*, 1999 EHB 124, 131. We have also noted that,

> the phrase "initiates an adversary adjudication" [ ] mean[s] that the Costs Act is applicable only in those cases in which an agency takes, upon its own initiative, some action against a party. This construction is consistent with section 2031(c)(2) of the Act which provides that it is the intent of the General Assembly to "deter the administrative agencies of this Commonwealth from initiating substantially unwarranted actions against individuals, partnerships, corporations, associations and other nonpublic entities." 71 P.S. § 2031(c)(2). It is apparent that the idea was to create a deterrent to abusive exercise of prosecutorial power.

Martin v. DER, 1986 EHB 101, 104. Clearly, then, an adversarial adjudication is a prosecutorial or enforcement action initiated by an agency.

Also, in light of the purpose of the Costs Act, it has not been construed to extend to parties who were not the target or recipient of the prosecutorial and/or enforcement action. *See Jay Township v. DER*, 1987 EHB 36 (third party appeal of issuance of mine drainage permit to coal company holding the Costs Act was enacted to protect citizens and domestic corporations from unjustified governmental intrusion and where Petitioners themselves initiate an appeal the

Costs Act clearly does not apply with regard to the award of attorneys' fees). In other words, the Costs Act does not come into play for the benefit of third parties in third party appeals.

This means that in order for there to be an adversary adjudication there must have been some prosecutorial and/or enforcement action of the Department of Environmental Protection and it must have been directed against the party or parties who seek the recovery of costs and fees.

Given that background, there is no "adversary adjudication" here and these Appellants are not covered by the Costs Act as to this case. DEP's granting PennDOT the Section 401 Water Quality Certification was not a prosecutorial and/or enforcement action, it was a granting of a certification which PennDOT requested. Nor was the action in any sense directed against either of the Appellants. Likewise, PennDOT's application for the Section 401 Water Quality Certification cannot be considered an adversary adjudication under the Costs Act. An application for a permit by PennDOT is obviously not a prosecutorial and/or enforcement action of PennDOT against any individual or entity. Moreover, a mere application would not come within the core definition of "adjudication" which is a "final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities, or obligations of any or all of the parties to the proceeding in which the adjudication is made."[4]

Although Appellants' disqualification for coverage under the Costs Act is complete upon the failure of the "adversary adjudication" component, we will address the other two components

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[4] We also note that even if the Costs Act definition of "adversary adjudication" could be stretched to cover the granting of the 401 Certification, the exclusion of "adjudications granting, reviewing or revoking a license or registration" would result in it being taken right back out again. *See* 71 P.S. § 2032.

for completeness and in case we are appealed and the Commonwealth Court gets further down the three components in its analysis.

"Prevailing Parties" Requirement

We reject that Appellants are "prevailing parties" here. The Costs Act defines a prevailing party as follows:

> A party in whose favor an adjudication is rendered on the merits of the case or who prevails due to withdrawal or termination of charges by the Commonwealth Agency or who obtains a favorable settlement approved by the Commonwealth Agency initiating the case.

71 P.S. § 2032. Here, of course, no adjudication on the merits was rendered. In fact, in rejecting a request by an Appellant that the Board dismiss the case "with prejudice" as to certain aspects thereof, the Board took particular note that,

> to the extent that the notion of dismissal 'with prejudice' suggests any determination of the merits of the subjects raised in summary judgment practice, that notion is antithetical to what is being done by this Opinion and Order. *There has been no determination of any of the merits of the subjects of the summary judgment practice.*"

Solebury Township v. DEP, EHB Docket No. 2002-323-K slip op. at 12 n.2 (Opinion issued January 16, 2004)(emphasis added).

Appellants argue that they are prevailing parties due to "withdrawal or termination of charges by the Commonwealth" or because they obtained a favorable settlement. They equate PennDOT's request for rescission of the 401 Certification and/or DEP's rescission thereof as qualifying as either withdrawal or termination of charges or their having obtained a favorable result, or both. However, in this case, as we alluded to before in our discussion of the "adversary adjudication" requirement, there were no "charges" here against anyone at all and none against Appellants. The granting of a Section 401 Water Quality Certification is not the bringing of charges. This, by the way, confirms the correctness or our analysis of the "adversary

adjudication" matter. "Charges" is the language of prosecution, not that of certification under Section 401. Since no "charges" were brought, none were withdrawn or terminated.

Appellant Buckingham's reliance on *Wood Processors, Inc. v. DER*, 1992 EHB 405, is completely misplaced. Indeed, that case affirmatively demolishes the Appellants' theories under the Costs Act. It was said in that case that a party "arguably" prevails under the Costs Act by virtue of a withdrawal of the DER action. However, this case is easily distinguishable. *Wood Processors* involved an appeal by Wood Processors and its President, Joyner of an order and civil penalty assessment naming each of them for operation of unpermitted solid waste processing facilities and use of illegal fill. Following a supersedeas hearing, in which Joyner was granted a supersedeas because sufficient evidence was not presented to hold him responsible under the "officer participation theory," DER withdrew the order and civil penalty. An amended order and civil penalty assessment was issued at the same time to supposedly correct any deficiency regarding Joyner's responsibility under the "officer participation theory." Joyner then filed an application for attorneys' fees and costs under the Costs Act. The Board did state that Joyner was "arguably" a prevailing party because DER had withdrawn its order, but attorney's fees and costs were denied because, in light of the amended order and civil penalty, Joyner had not yet prevailed as to the substance of DER's charges. *Wood Processors*, 1992 EHB at 409-410.

Of glaring significance is the difference in the nature and the status of the proceedings in *Wood Processors* versus the situation here both on the "prevailing party" front and the "adversary adjudication" front. As for the "prevailing party" issue, Joyner had won a supersedeas ruling in his favor on the merits of the case. That is a very far cry from what

Appellants have done in this case. Here, as we have already noted and we note again, by no stretch of the imagination have Appellants won anything regarding the merits of this case.

On the "adversary adjudication" issue, *Wood Processors* involved an order and civil penalty issued by DER against the petitioner, Joyner. Thus, *Wood Processors* involved: (1) a prosecutorial and/or enforcement action; (2) directed against the Costs Act applicant. Neither are so in this case. *Wood Processors* was not, as is this case, a third party action. Here, no action was initiated against the Appellants nor was any prosecutorial and/or enforcement action taken against anyone. To put it in the lexicon of the Costs Act, there was no "adversary adjudication" in this case and no action of any kind against any of the Appellants.

Finally, there is no "favorable settlement" in this case. Indeed, there is no settlement at all, just a motion to dismiss for mootness which was granted—over the opposition of the Appellants. There was clearly not a dismissal pursuant to any settlement.

Position of the Agency Be "Substantially Unjustified" Requirement

An Agency's position (or Agencies' positions) are substantially justified "when such position has a reasonable basis in law and in fact". 71 P.S. § 2033. The Costs Act states that the Agency's loss in litigation or its settlement of a case shall not raise a presumption that its position was not substantially justified. *Id.* Since neither of those eventualities occurred in this case the negative injunction does not apply. Obviously, though, that neither the Agency lost in litigation nor settled raises no affirmative presumption either.

Presumptions aside, from our repeated emphasis that in no way, shape or form have Appellants prevailed in any respect on any point in this case, and that there has been no decision on the merits of this case—one way or the other, flows the necessary corollary that we cannot conclude that either Commonwealth Agencies' positions in the case have been shown to be

either substantially justified or substantially unjustified. There having been no finding on our part at any point in this proceeding that the Agencies' positions, or any part of them, were substantially unjustified, Appellants fail to make out the third prong of the Costs Act test as well.

Accordingly, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

SOLEBURY TOWNSHIP, BUCKINGHAM TOWNSHIP, & DELAWARE RIVERKEEPER, DELAWARE RIVERKEEPER NETWORK & AMERICAN LITTORAL SOCIETY	:	
v.	:	**EHB Docket No. 2002-323-K (Consolidated with 2002-320-K & 2003-012-K)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, Permittee	:	

ORDER

AND NOW, this 4th day of March, 2004 Buckingham Township's and Delaware Riverkeeper's applications for attorneys' fees and costs under the Costs Act are denied.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

Judge Miller did not participate in the deliberations or decision in this matter.

DATED: March 4, 2004

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SOLEBURY TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2002-288-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW HOPE CRUSHED STONE AND LIME COMPANY, Permittee	:	**Issued: March 5, 2004**

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis

The Board remands an appeal from the renewal of an NPDES permit for the operation of a quarry initiated by the hosting municipality, for further consideration by the Department of the discharge rate authorized by the permit. In view of residential well failures and data indicating that the authorized discharge is in excess of the basin's recharge, the Department did not adequately consider the availability of water for other users. Further, the permit places no limits upon the permittee's ability to pump even during times of drought or low water supply in the basin.

The Board also concludes that the appellant-township's challenge to the permit renewal is not foreclosed by the doctrine of administrative finality because it is a challenge to the continuation of the NPDES permit at a particular discharge rate and not a collateral attack upon past approvals or the mining permit.

INTRODUCTION

Before the Board is an appeal filed by Solebury Township (Appellant) which challenges the renewal of an NPDES permit issued to New Hope Crushed Stone and Lime Company (Permittee). The Department approved the Permittee's renewal application on October 9, 2002. The NPDES permit authorizes the Permittee to discharge up to an average of four million gallons per day of water from its quarry operation located in Solebury Township. The Appellant challenges the permit on the basis that it does not adequately protect the hydrologic balance of the Primrose Creek Basin, located within the township.

A hearing was held before Administrative Law Judge George J. Miller on September 29-30 and October 3, 2003. The record in this case consists of a transcript of 661 pages and more than 30 exhibits. Also a stipulation of facts agreed to by all the parties was admitted into evidence. Each party has filed a post-hearing brief which included proposed findings of fact, conclusions of law and a legal memorandum. After fully considering all of these materials, we make the following:

FINDINGS OF FACT[1]

1. The Appellant is Solebury Township, a Township of the Second Class located in Bucks County Pennsylvania. (Ex. B-1, ¶ 1)

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[1] The notes of testimony are designated a "N.T. __". There is a separate volume for each day of hearing, designated as V.1, V.2 and V.3. The parties agreed to a stipulation of facts, which was admitted into evidence as Ex. B-1. The Township's exhibits are designated as "Ex. T-_"; the Permittee's as "Ex. P-_"; and the Department's as "Ex. C-_".

2. The Department of Environmental Protection is the government agency charged with the duty and authority to administer the Noncoal Surface Mining Conservation and Reclamation Act[2] and the Clean Streams Law.[3] (Ex. B-1, ¶ 2)

3. The Permittee is the New Hope Crushed Stone and Lime Company, a corporation with a principal place of business in Solebury Township. The Permittee operates a stone quarry at its property in Solebury Township pursuant to the permits described below. (Ex. B-1, ¶ 3)

Permit History

4. The Department has issued the following permits (among others), on the dates indicated, to the Permittee in connection with its quarry operations located in Solebury Township:

a. March 2, 1976 Large Surface Mining Permit;

b. July 30, 1991 Noncoal Authorization to Mine #300727-7974SM3-0101(C4);

c. February 17, 1993 Permit Correction of Existing Permits 7974SM3(C) and NPDES #PA0595853;

d. May 11, 1998 Permit Revision of Surface Mining Permit #7974SM3C4 and NPDES #PA0595853;

e. October 9, 2002 Permit Correction of Existing Permit #7974SM3C4 Renewal of NPDES #PA0595853.

---

[2] Act of December 19, 1984, P.L. 1093, *as amended*, 52 P.S. §§ 3301-3326 (Noncoal Surface Mining Act).

[3] Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- 691.1001 (Clean Streams Law).

(Ex. B-1, ¶ 4; see also Exs. C-1; C-2)

5. The May 11, 1998 NPDES permit renewal was part of a broader Mining Permit Correction in which the Department authorized a relocation of the quarry's discharge points; authorized a discharge of pit water to the Primrose Creek; authorized a wetland mitigation plan; and authorized a revision to the existing reclamation plan. (Ex. B-1, ¶ 7)

6. The May 11, 1998 NPDES renewal allowed for an average discharge rate of four million gallons per day, increasing the one million gallon per day rate of the prior permit. That permit renewal also required monitoring and other limitations as stated in the permit renewal. (Ex. B-1 ¶ 7; see also Hill, V.2 at 92-95)

7. No person, including Solebury Township, appealed either the renewal of the NPDES permit or the correction to the mining permit in 1998. (Ex. B-1, ¶7)

8. The October 9, 2002 NPDES permit renewal also authorized an average discharge rate of four million gallon per day. (Ex. B-1, ¶8)

9. The 2002 NPDES permit renewal was not approved in connection with any change in any quarry operations being conducted or planned by the Permittee or in connection with any Mining Permit correction. All NPDES permits expire five years from their issue date, and this permit was renewed for that reason. (Ex. B-1, ¶¶ 9, 14)

10. Neither the 2002 NPDES permit nor its 1998 predecessor specifies the period for which "average daily discharge" is calculated. However, the Department calculates the average on a monthly basis. (Ex. C-1; Hill, V.2 at 184, 199)

11. There is no maximum daily discharge limit in the permit. (Ex. C-1)

Department Review of the Permit Renewal

12. In 1998 the Permittee's discharge rate was increased from 1 mgd to 4 mgd because the existing rate was no longer adequate to meet the Permittee's pumping needs during peak periods such as storm events. (Hill, V.2 at 95, 185-86)

13. Mr. Hill approved the new discharge rate because the quarry was regularly exceeding the 1 mgd rate, which correlated with monitoring data from the quarry's monitoring wells, and there was no dewatering event occurring at that time. (Hill, V.2 at 98-99)

14. Although not a common occurrence, the discharge data submitted by the Permittee indicated several instances where the Permittee pumped over 4 mgd. (Hill, V.2 at 98-99; See also Ex. T-5 at Table 2.2)

15. The discharge rate of 4 mgd was proposed by the Permittee. Mr. Hill approved the rate because he "didn't have any reason to not grant them that 4 million gallons, because we're not going to tell them how to operate their operation." (Hill, V.2 at 215-16)

16. Based upon quarry monitoring well data, described in more detail below, Mr. Hill concluded that the hydrologic balance was in a state of equilibrium. (Hill, V.2 at 216; See Finding of Fact Nos. 69, 71, 73)

17. As part of his consideration of the Permittee's renewal application Mr. Hill considered several reports prepared by the Appellant's expert Vincent Uhl. These reports, described in more detail below, provided an evaluation of the groundwater recharge of the Primrose Creek Basin, and studied groundwater elevation in the basin. (Hill, V.2 at 128; Exs. T-5; T-7)

18. Mr. Hill also considered a report submitted by the Permittee's expert criticizing the Uhl reports. (Hill, V.2 at 128; Ex. P-4)

19. The October 9, 2002 NPDES permit renewal simply served to extend the expiration date of the NPDES permit for an additional five years; there was no material change to the terms of the permit. (Hill, V.2 at 100)

Special Permit Conditions, The Water Loss "Protocol" and Proposed Aquifer Study

20. Mr. Hill testified that Special Condition 9 of the permit provides that the Department may require additional monitoring if deemed necessary. (Ex. C-1; Hill, V.2 at 190)

21. Condition 9 of the permit provides that

> Permittee shall submit groundwater monitoring data (static water levels) from monitoring wells MW-3 through MW-10 on a quarterly basis. . . . The Department reserves the right to limit the allowable depth based on interaction of lower level mining in Pit 2 [North Pit] with the groundwater regime.

22. The Department utilizes monitoring well data as a gauge for impacts of mining in order to distinguish between effects caused by seasonal changes versus impacts caused by mining. (Hill, V.2 at 191)

23. Mr. Hill believes that the monitoring well network utilized by the Permittee is adequate to assess any potential impacts caused by mining, based on the number of monitoring points and their location around the quarry. (Hill, V.2 at 192)

24. Mr. Uhl disagrees and believes that the current monitoring well system for the quarry is inadequate to protect the hydrologic balance for the basin because they fail to monitor water levels in wells located in geologic units other than the limestone that may be influenced by quarry pumping. (Uhl, V.2 at 60)

25. Mr. Hill has been responsible for all water loss complaint investigations at the quarry since 1993. (Hill, V.2 at 151; Ex. C-8)

26. The 1993 Burke report is a Department study of the basin and quarry operation. This report was prepared in response to water loss complaints in the vicinity of the quarry following a dewatering event in the late 1980s or early 1990s. The report concluded that the Permittee's quarry has "influenced the water table for a distance of two thousand feet north along Ely Road." The report also found thirteen residences were eligible for new wells paid for by the quarry. (Ex. T-4)

27. The Burke report has provided the foundation for addressing water loss complaints. At the request of the Department, the Permittee, by letter dated December, 2002, memorialized the current procedure for addressing water loss complaints within the zone of influence agreed upon by the Permittee and the Department. (Hill, V.2 at 106-111; 164; Ex. C-10)

28. According to this protocol, barring a mechanical failure, if a well is located within the zone of influence, the Permittee will repair or replace the affected water supply. If the well is located outside of the zone of influence the Permittee will look to the Department to investigate and make a decision on the Permittee's responsibility. (Hill, V.2 at 162-63)

29. The December 2002 letter also included a proposal by the Permittee to perform an aquifer study before it deepens its operation below, 110 feet below mean sea level (msl). (Hill, V.2 at 166-67; Ex. C-10)

30. This will occur after the "peninsula" between the North Pit and the South Pit is removed, and the North Pit is lowered to the level of the South Pit. (Riordan, V. 3 at 99-101; Hill, V.2 at 232-35)

31. At the current rate of operation, this will occur in 7-10 years (Riordan, V.3 at 93)

32. The Permittee's commitment to perform the hydrologic study has not been formalized with the Department. (Hill, V.2 at 234)

The Quarry Operation

33. George Riordan is a Vice-President employed by the Permittee. He is responsible for overseeing the day-to-day operation of the quarry. (V.3 at 81)

34. The Permitte is currently operating at capacity as limited by its production facility. (Riordan, V.3 at 92)

35. The quarry consists of two pits, the North Pit and the South Pit, separated by a peninsula of stone. (Ex. T-7; Riordan, V.3 at 97)

36. The South Pit has been mined to a depth of –133 feet mean sea level (msl) and the North Pit has reached a depth of –33 feet msl. (Hill, V.2 at 167)

37. Currently, the quarry uses the South Pit as a water impoundment. (Riordan, V.3 at 85, 94)

38. When the peninsula between the pits is removed, the South Pit will no longer be used as a water impoundment. (Riordan, V.3 at 104)

39. The quarry pumps at a rate which keeps water levels manageable for the quarry operation. (Riordan, V.3 at 88)

Experts

40. Vincent Uhl is a principal of Vincent Uhl Associates. He is a hydrogeologist who works primarily in the area of water supply and other environmental projects. He has a Master's Degree in Hydrology and is certified by the American Institute of Hydrologists and the American Institute of Professional Geologists. He was admitted by the Board as an expert testifying on behalf of Solebury Township. (V.1, 9-12; 22)

41. Louis Vittorio, a principal with EarthRes Group, testified on behalf of the Permittee. He is a hydrogeologist and does work related to water supplies, quarry and landfill operations, among other things. He holds a Masters Degree in Geology and is a licensed Professional Geologist in the Commonwealth of Pennsylvania. He was accepted by the Board as an expert. (V.2 at 283-84; 289)

42. Michael Hill testified on behalf of the Department. He is a geologic specialist employed by the Department. Although his current job duties center on stream assessments relating to acid mine drainage, he was previously responsible for permit reviews and groundwater investigations related to citizen complaints. He holds a Bachelor's Degree in Geology and has completed a graduate level course in hydrogeology. He has been involved with the Permittee's quarry since 1992. He was the permit reviewer for the 1998 mining permit revision, the NPDES permit renewal and revision. He was qualified as an expert in the field of hydrogeology by the Board. (V.2 at 86-91)

Geology of the Primrose Creek

43. The Primrose Creek Basin, located in the eastern portion of central Solebury Township, is approximately 2.64 square miles in size. Located within the basin is the

Permittee's quarry which is 117 acres in size, or six to seven percent of the basin. (Uhl, V.1 at 29, 175)

44. Solebury Township relies entirely on groundwater as the source of its water supply. Accordingly, the aquifer of the Primrose Creek basin is a sole source aquifer; it is the only source of drinking water for residences located within the basin. (Uhl, V.1 at 92; Ex. T-7)

45. Solebury Township was in a drought condition from 1998-2002. (Vittorio, V.2 at 306-307; V.3 at 11; Uhl, V.1 at 134; V.2 at 16)

46. The geology of the Primrose Creek Water Basin includes several limestone (carbonate rock) and sandstone (sedimentary rock) features. The basin is bordered by two "no flow" or low permeability zones: the Furlong Fault, which runs within the southeast boundary of the basin and the diabase dike which is oriented from the southeast to the northwest on the western side of the basin. (Ex. T-10; Uhl, V.1 at 31-33; Hill, V.2 at 111; 141; but see Vittorio, V.3 at 56-57 (disagreeing that the fault is a no-flow boundary))

47. The quarry is located in a low lying area of the basin. It is underlain by a limestone formation known as Conococheague limestone. A sandstone formation known as the Stockton Formation runs next to the limestone. The limestone dips beneath the sandstone not far from the quarry. (Uhl, V.1 34, 72; Exs. T-10; T-7)

48. Groundwater flows from the north/northwest of the quarry. (Hill, V.2 at 147)

Recharge Analysis

49. Mr. Uhl performed several water balance calculations for the basin. In his December 2000 study, he concluded that in a year of normal precipitation, that the

recharge of the basin was 1.5 million gallons per day (mgd). This calculation assumed that the basin was 2.6 square miles in size. (Uhl, V.1 at 53-58; T-5)

50. To determine quarry pumpage, Mr. Uhl used a fifteen-year average and calculated 1.73 mgd. (Uhl, V.1 at 57; T-5)

51. Based on these calculations it was Mr. Uhl's opinion that the natural recharge for the basin was 1.5 mgd. This means that, on average, the quarry pumped in excess of the natural groundwater recharge of the basin in the amount of .23 mgd. (Ex. T-5; Uhl, V.1 at 57)

52. Mr. Uhl admitted that these calculations assumed that all of the quarry pumpage consisted of groundwater. (Uhl, V.2 at 48)

53. In other reports, Mr. Uhl assumed that the basin was two square miles to take into account the low permeability boundaries created by the Furlong Fault and the diabase dike. This area was referred to as the "truncated basin." The reason Mr. Uhl used the truncated basin area for his calculations is because he did not believe that the area east of the fault was influenced by the quarry. (Uhl, V.1 at 128-29; e.g. Ex. T-12)

54. In response to criticism from the Department and the Permittee's expert that Mr. Uhl had limited his calculation of groundwater recharge in the basin to groundwater flow, he recalculated his water balance to account for surface water and concluded that the amount of water available for recharge is between 1.7 mgd and approximately 2 mgd, depending on whether the area of the basin was truncated or considered as a whole. (Uhl, V.1 at 129-30; Ex. T-12)

55. Louis Vittorio also performed water balance calculations for the basin. Although he characterized Uhl's calculations as "thorough" his primary disagreement

was with the assumption that all the water that was pumped by the quarry was groundwater. Specifically, Uhl's calculations did not account for direct precipitation into the quarry. (Vittorio, V.2 at 314-16, V.3 at 29-30)

56. Mr. Vittorio concluded that, assuming the basin is 2.6 square miles, there is 2.26 mgd available for recharge. Using the truncated basin, approximately 2 mgd is available. (Vittorio, V.3 at 58-60; Ex. P-4)

Well data

57. The March 2003 Uhl study was a survey of residential well problems in the area surrounding the quarry. Seventy well owners were interviewed in the areas of Phillips Mill Road, Ely Road, School Lane and Sugan Road. (Uhl, V.1 at 96, 102; Ex. T-10)

58. Mr. Uhl documented thirteen well problems by ten residents in the vicinity of the quarry from 1998 to 2003. These residents had to have their wells replaced, deepened or have been required to lower the pumps. (Ex. T-13)

59. There have been no technical difficulties in obtaining alternate water supplies for affected residents. (Hill, V.2 at 153)

60. Mr. Uhl concluded that many of the well problems could be attributed to pumping at the quarry. (Uhl, V.1 at 125)

61. Although several of the wells which Uhl reported had problems had been affected by the drought, over time water levels in these wells has been diminished by over 100 feet as a result of pumping by the quarry. Therefore these wells had no protection from the drought. (Uhl, V.1 at 91, 123-24, 127)

62. Further, Mr. Uhl believed that groundwater "leaks" from the Stockton sandstone formation into the limestone formation in which the quarry is located where the two formations come into contact. This, in his opinion, explains why many of the wells located in the Stockton sandstone along the contact have had to be deepened or replaced recently. (Uhl, V.1 at 127; see also V.1 at 63)

63. He further compared two areas in the Stockton sandstone which were located at a reasonable similar topographic elevation and at a similar density. One, the Ely Road wells, is located close to the sandstone/limestone contact near the quarry. The other, control area, was located further away from this contact.

a. Wells located in the control area had water levels from 18 feet mean sea level (msl) to 63 feet msl; wells in the Ely Road area were 100-200 msl;

b. Of the Ely Road wells, 24 of the 33 residents that Mr. Uhl interviewed had wells that had to be replaced, deepened or required lowered pumps. In the control area, only two pumps were lowered and one well was deepened.

(Uhl, V.3 at 114-16)

64. Mr. Uhl did not see water level fluctuations during the period of drought in wells located beyond the influence of the quarry that were also located in the Stockton sandstone. (Uhl, V.1 at 146-47; V.3 at 114-15, 116)

65. This data confirmed that the quarry's zone of influence reached to the southern side of Ely Road as had been documented in a 1993 report prepared by the Department. Contrary to the Permittee's expert, he did not believe that drawdowns between residential wells a few hundred feet apart caused the low water level readings.

Rather, the well problems were caused by quarry pumpage. (Uhl, V.3 at 116-17; see Exs. T-4; C-4)

66. Mr. Vittorio did not have his own data to conclude that the quarry caused dewatering of wells in the Stockton sandstone, or to comment on the extent of the quarry's zone of influence. (Vittorio, V.3 at 6, 50)

67. Mr. Hill and Mr. Vittorio testified about well data from the quarry's monitoring well network.

68. Mr. Vittorio plotted monthly precipitation data, pumping data and water levels in selected monitoring wells for the years 1997, 1999 and 2001. In most instances the hydrographs demonstrated that as precipitation increases, so do static water levels in the monitoring wells and the quantity of water pumped by the quarry. As precipitation decreased, so did static water levels and quarry pumping. (Vittorio, V. 2 at 301-314; Hill, V. 2 at 132-36; Ex. P-4 at Figures 1-3)

69. Based on quarry monitoring well data from 1993 to the present, Mr. Hill concluded that there is hydrologic equilibrium in the vicinity of the quarry. In his opinion, generally the data shows a steady state condition with no obvious drawdown or recovery trends. (Hill, V.2 at 122-24)

70. The quarry pumped less water during the period of drought. (Vittorio, V.3 at 16)

71. Although data from the quarry's monitoring wells indicates a dewatering even in the late 1980s and early 1990s, the hydrographs do not indicate a discrete dewatering event during the period of 1993 to 2001. (Hill, V.2 at 121, 126; Ex. C-5)

72. Mr. Vittorio's opinion was that the water loss problems in local wells had been caused by drought conditions in the watershed during this time period. (Vittorio, V.2 at 318)

73. There is no data suggesting that the water table has lowered since 1998, according to the data in the hydrographs. (Vittorio, V.3 at 25)

74. Pumping data from the quarry indicates that average pumping by the quarry has decreased since 1998. (Vittorio, V.3 at 25; Ex. T-5 at Table 2.2)

75. Further, he observed that, generally, wells located within Stockton sandstone tend to be more affected by seasonal precipitation fluctuations. (Vittorio, V.3 at 6)

76. There is not enough data from residential wells and no correlation between residential wells and the quarry monitoring wells to conclude that the quarry has caused dewatering. (Vittorio, V.3 at 17-18)

77. Mr. Vittorio expressed reservations about the well data relied upon by Mr. Uhl. First, the sampling data was taken at such long intervals that seasonal fluctuations are not accurately shown. Second, domestic wells, in contrast to non-consumptive monitoring wells, are more susceptible to influence from domestic consumption. (Vittorio, V.2 at 294; see also Hill, V.2 at 255-56)

78. Mr. Uhl agreed that there existed a "quasi-equilibrium" within the limestone formation in which the quarry is situated. (Uhl, V.3 at 112)

79. Mr. Hill characterized the water level readings from the quarry monitoring well on Ely Road as a relatively flat trend. (Hill, V.2 at 125; Ex. C-5, Chart 3)

80. Mr. Hill believed that regional groundwater flow could be a part of the intercepted groundwater component of the quarry's discharge. This theory was based on the basin's proximity to the Delaware River and the level of mining. (Hill, V.2 at 148)

81. Mr. Vittorio agreed with Mr. Hill's theory. He added that if there was no regional groundwater flow, the aquifer would have dried up long ago. (Vittorio, V.3 at 72, 75-76)

82. However, he believed that a study should be done to find out whether regional groundwater plays a role in the basin. (Vittorio, V.3 at 38)

83. Mr. Uhl disagreed that there was a regional flow component to the basin's groundwater flow. First, the basin is bordered by low permeability zones. Second, there was no support for this theory in the USGS groundwater analysis of the area. (Uhl, V.3 at 112-13)

84. He testified that the basin did not dry up because the groundwater available for recharge is approximately equal to the amount of water that the quarry is pumping on average. (Uhl, V.3 at 110-11)

85. Nevertheless, it was Mr. Uhl's opinion that if the quarry continues to pump at its permitted average of 4 mgd, that more wells will be impacted. This rate of pumpage is not a good idea in his professional opinion given that the basin recharge is only 1.7 mgd. (Uhl, V.1 at 92, 129-30; Ex. T-7A)

86. Mr. Uhl also stated his opinion that as the North Pit is mined down to the level of the South Pit, it will affect groundwater levels because as mining proceeds deeper, additional water will need to be pumped. As additional water is pumped, the quarry's

zone of influence will expand within the limits of the low-permeability zones. (Uhl, V.3 at 118)

87. In Mr. Uhl's opinion, the proposed aquifer study should be done before the North Pit is mined down to the level of the South pit to prevent further damage to the hydrologic balance of the basin. (Uhl, V.3 at 119)

DISCUSSION

This is an appeal from the Department's renewal of an NPDES permit issued to New Hope Crushed Stone and Lime Company (Permittee) which authorizes a discharge up to an average four million gallons per day (4 mgd) from the Permittee's quarry operations. This permit was issued as a "correction" to the Permittee's noncoal surface mining permit. The Appellant is Solebury Township, the municipality in which the Permittee's quarry is located.

In a third party appeal from a permit issuance or renewal, it is the appellant who bears the burden of proof.[4] In this matter, the Appellant must prove by a preponderance of the evidence that the Department erred in approving the renewal of the Permitee's NPDES permit. Our review is *de novo*, therefore we will consider not only evidence which was considered by the Department in renewing the permit, but also evidence which was admitted by the Board during the hearing.[5]

The Appellant makes a single argument in this appeal: the Department erred in renewing the NPDES permit at the discharge rate of an average of 4 mgd because

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[4] 25 Pa. Code § 1021.122(c)(2).

[5] *Pequea Township v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998); *Warren Sand and Gravel Co. v. Department of Environmental Resources*, 341 A.2d 556 (Pa. Cmwlth. 1975); *Smedley v. DEP*, 2001 EHB 131.

continued discharge at that rate will upset the hydrologic balance of the Primrose Creek Basin, thereby violating the surface mining regulations, which are incorporated into the NPDES regulations. These regulations require that disturbance to the hydrogeologic balance be minimized. The Permittee and the Department dispute not only the substantive argument made by the Appellant, but also argue that the Appellant's challenge is not justiciable. They contend that since the 4 mgd rate was included in the prior NPDES permit issued in 1998 and there have been no changes in the Permittee's operations, this appeal is precluded by the doctrine of administrative finality. It is this argument that we shall address first.

Administrative Finality

The purpose of administrative finality is to give administrative actions some level of uncontestability which is critical to the "orderly operations of administrative law."[6] Therefore, "one who fails to exhaust his statutory remedies may not thereafter raise an issue which could have and should have been raised in the proceeding afforded by his statutory remedy."[7] For example, an appeal from the modification of a permit may not include objections that could have been raised in an appeal of the original permit.[8] In the case of permit renewals or reissuances, we have noted that an appellant may challenge only those issues which have arisen between the time the permit was first issued and the

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[6] *Department of Environmental Resources v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d 765, 767 (Pa. Cmwlth. 1975), *affirmed*, 375 A.2d 320 (Pa. 1977).

[7] *Wheeling-Pittsburgh Steel Corp.*, 348 A.2d at 767 (quoting *Philadelphia v. Sam Bobman Department Store Co.*, 149 A.2d 518, 521 (Pa. Super. 1959)).

[8] *E.g.*, *Grand Central Sanitary Landfill v. DEP*, 1996 EHB 831.

time it was reissued or renewed.[9] This concept was recently discussed in the context of a renewal of an NPDES permit by Judge Labuskes in *Tinicum Township v. DEP*[10] :

> An application for a renewal does not compel the Department to reexamine whether the original permit should have been issued in the first place. It does, however, require the Department to ensure that a *continuation* of the permitted activity is appropriate based upon up-to-date information. Similarly, our review focuses upon the *continuation*, not the historical initiation, of the activity in question. "The doctrine of administrative finality has no application where the issues raised in a different proceeding in which new facts are relevant to the propriety of the Department's action."[11]

The Permittee strenuously points out that the renewed permit does not change the discharge rate of the prior permit, nor was it issued in the context of any change in the quarry's operation. The Appellant does not dispute these facts. But these circumstances are not the only changes which may be relevant to the propriety of continuing the permit at the 4 mgd discharge rate. Notably, the Primrose Creek Basin has suffered several years of drought which, coupled with the increase in the permitted pump rate, may have affected the availability of groundwater and is certainly a new circumstance relevant to the continuation of the NPDES permit. The *Tinicum* appeal raised a similar concern:

> Here, the permit authorizes a discharge of up to 3.456 million gallons per day. That water must be coming from somewhere. Repeated seasons of drought have heightened awareness that water is not the infinite resource that we once thought it to be. A discharge that proposes to, in effect, draw up to 3.456 million gallons per day out of the

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[9] *Yourshaw v. DEP*, 1998 EHB 37.
[10] 2002 EHB 822.
[11] 2002 EHB at 835-36 (quoting *Riddle v. DEP*, 2002 EHB 321,327).

> local hydrological regime is certainly worthy of at least some considered attention.[12]

The Permittee also argues that administrative finality applies because the Appellant did not ultimately prove that problems with residential wells after 1998 have accelerated over time or are evidence of hydrologic imbalance. This argument focuses on the ultimate merits of the Appellant's appeal. Although, as we discuss below, the Appellant may not ultimately prevail on this point, it does not mean that its claim is not justiciable in the first instance.

Accordingly, we hold that administrative finality does not preclude the Appellant's appeal. Our inquiry is whether the approval of the discharge of up to an average of 4 mgd for the next five-year term of the NPDES permit was reasonable and in accordance with the law.

Regulatory Backdrop

Section 92.13 of the Department's regulations governing the renewal of NPDES permits provides that the Department may renew a permit only if the permittee is in compliance with other permits that it may hold:

> Upon completing review of the new application [for renewal], the Department may reissue or renew the permit if, based on up-to-date information on the permittee's waste treatment practices and the nature, content and frequency of the permitee's discharge, the Department determines that the:
>
> (1) Permittee is in compliance with all existing Department-issued permits, regulations, orders and schedules of compliance . . . .

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[12] 2002 EHB at 836.

> (2) Discharge is . . . consistent with the applicable water quality standards, effluent limitations or standards and other legally applicable requirements established under this title . . . .[13]

Further, the issuance of the NPDES permit may not cause a violation of the Permittee's mining permit.[14] The Department's applicable noncoal surface mining regulations require that the hydrologic balance of the permit area and adjacent areas be protected and disturbance to be minimized:

> (a) Noncoal mining activities shall be planned and conducted to minimize disturbances to the prevailing hydrologic balance in the permit and adjacent areas.
>
> (b) Changes in water quality and quantity, the depth to groundwater and the location of surface water drainage channels shall be minimized so that the approved postmining land use of the permit area is not adversely affected. . . .[15]

This requirement is a continuing requirement. Therefore the NPDES renewal application must demonstrate that the discharge rate can be continued with as little disturbance to the hydrologic regime as possible, considering present purposes or future needs of all the users of the water resources where legitimate concerns are raised.

The Evidence

The Appellant's evidence is based on two main contentions: (1) discharge at the rate of 4 mgd results in the removal of groundwater from the basin in excess of natural recharge; and (2) residential wells in the vicinity of the quarry are experiencing water loss at an increasing rate which is caused by the pumping at the quarry. The Appellant

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[13] 25 Pa. Code § 92.13(b).

[14] *Tinicum Township v. DEP*, 2002 EHB 822; *Oley Township v. DEP*, 1996 EHB 1098.

[15] 25 Pa. Code 77.521.

therefore concludes that the hydrologic balance of the basin has been upset and the Department erred in renewing the permit at that rate of discharge.

In contrast, the Permittee[16] contends that (1) the Appellant's recharge analysis is based upon faulty assumptions; (2) even if well failures are a result of pumping by the quarry, the quarry has replaced those wells without difficulty thereby minimizing any adverse consequences; and (3) monitoring data from the quarry's monitoring well system indicates that the basin is in a state of equilibrium, not imbalance.

After carefully reviewing the evidence presented, we do not believe that the Department adequately scrutinized the Permittee's renewal application or fully considered whether impact to the hydrologic balance is, in fact, being minimized. We reach this conclusion because the permit authorizes an average daily pumping rate that may well be in excess of the recharge of the basin without sufficient information about the availability of water for other users; and the Department had no information concerning the future availability of alternative water supplies, but relied solely on past history. Further, the Department relied solely upon data from the Permittee's monitoring wells, which offer no insight into the effect of pumping by the quarry in other geologic formations, took for granted the Permittee's need for a pump rate of 4 mgd with no independent investigation, and relied upon the water replacement provisions of the mining law rather than requiring the Permittee to affirmatively demonstrate that its operation was conducted to minimize disturbance to the hydrogeologic balance of the basin.

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[16] The Department makes essentially the same arguments.

Both the Appellant and the Permittee performed "water balance" calculations which were reviewed by the Department in the context of its review of the Permittee's renewal application. The calculations had several elements in common. Both made their calculations based upon a discharge rate of 1.73 mgd, which was calculated as an average of the Permittee's discharge rates over the past fifteen years. Both used similar figures for precipitation, and other numbers necessary for the calculation. However, neither the Appellant, the Permittee nor the Department agreed about whether it was prudent to include the entire area of the basin in the calculations or whether the areas outside the "no flow zones" of the diabase dike and Furlong Fault should be excluded. The experts also did not include all of the same elements in their calculations. Specifically, the Permittee included precipitation that falls directly into the quarry and discharge from a stream. The Appellant initially only considered groundwater and not surface water. Therefore, the numbers calculating the water available for recharge were as low as 1.5 mgd[17] and as high as 2.6 mgd.[18]

For our purposes, it is not necessary to decide whether or not to include the area of the basin which is outside the no flow boundaries or what elements of precipitation are appropriate to consider. What is clear regardless of which calculation is relied upon -- even if we accept the Permittee's calculation of 2.6 mgd of available recharge -- these numbers are well below the permitted average discharge rate of 4 mgd. Although both the Permittee's expert and the Department theorized that there may be additional contribution of regional groundwater flow, neither adduced any study to support that contention other

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[17] Uhl, V.1 at 53-58.
[18] Vittorio, V.3 at 58-60.

than the basin's proximity to the Delaware River.[19] The Appellant's expert did not believe that any regional flow contributed to the basin's groundwater, given the low permeability zones that border the basin and data from the USGS.[20] Even the Permittee's expert conceded that this is an issue which should be studied.[21]

Further, there appears to be an increasing trend of well problems in the vicinity of the quarry and disparate water level readings between wells in the Stockton formation near the quarry on Ely Road and those located in the same formation but beyond the influence of quarry pumping. Mr. Uhl theorized that the groundwater in the Stockton sandstone leaks into the limestone formation which is influenced by the quarry. He compared well readings in two areas of the basin underlain by Stockton sandstone, one within the influence of the quarry and one area outside the influence of the quarry. Not only did residents in the area closer to the quarry report significantly more problems with their wells, water levels in these wells were significantly lower than those found in Stockton wells located further away. Further, wells located in the Stockton sandstone but beyond the influence of the quarry were less affected by the drought.[22] Although the Permittee criticized the manner in which these well readings were taken, it did not have its own data from outside the quarry's monitoring well network which showed different results.

The Permittee relied primarily upon data from the quarry monitoring wells which surround the quarry. Data from these wells, plotted on a monthly basis, shows that

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[19] *See* Hill, V.2 at 238.
[20] Uhl, V.3 at 112-13.
[21] Vittorio, V.3 at 36.
[22] Uhl, V.1 at 146-47; V.3 at 114-15, 16.

generally, the pumping rate at the quarry is related to the amount of precipitation that falls.[23] Even Mr. Uhl agreed that, at least within the limestone, the quarry monitoring wells appeared to demonstrate a static condition or "equilibrium."[24] But this data, unlike that presented by the Appellant, offers no insight into what may be occurring to residential wells located outside the limestone formation, but still within the quarry's zone of influence. Nor does it explain the water losses in the Stockton wells. The Permittee's explanation that drought by itself caused these failures is unconvincing without data other than the monitoring wells outside the limestone to support that position.

In short, the Department had before it information which suggested that residential water supplies were failing in the vicinity of the quarry, and that there was less than 3 mgd of water available for recharge in the basin. Coupled with the recharge calculations, these failures may indicate that the continued discharge of 4 mgd does not minimize disturbance to the hydrologic balance. Yet, the Department gave absolutely no consideration to the pump rate in the discharge permit, but accepted the Permittee's proposal of 4 mgd on its face and placed no limitations upon it. Mr. Hill's justification for this approach was that he "was not going to tell them how to operate their operation."[25] The several years of drought have certainly had an effect on the basin's water table. Mr. Uhl's data at least creates a strong possibility that the quarry may be affecting wells beyond the limestone formation in which the quarry is located. This data surely demonstrates that the discharge rate required additional scrutiny by the

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[23] Hill, V.2 at 132-36; Ex. P-4.
[24] Uhl, V.3 at 112.
[25] Hill, V.2 at 215-16.

Department. Accordingly, we find the Department's failure to do so was an abdication of its responsibility to protect water resources as dictated by its own regulations requiring that impact to the hydrologic balance be minimized. Although the Permittee's ability to keep its pit dry and maximize its production is important, the Department must balance that interest with those of other users of the water resource.

Both the Department and the Permittee place a great deal of reliance upon the fact that the water losses which were attributed to the quarry by the Department were replaced without difficulty by either lowering the pump or deepening the well under the auspices of an informal agreement between the Department and the Permittee.[26] However, this fact alone does not constitute a plan to minimize disturbance to the hydrologic balance. First, the law requires the Permittee to replace water supplies affected by mining, regardless of any agreement it may have with the Department.[27] Second, the obligation to operate a mining facility to minimize disturbance is meant to be a proactive course of conduct so that replacement of water supplies can be avoided. Here, the Department did no investigation to determine whether there would *continue* to be an adequate supply of water in the future if the Permittee continues to pump at its permitted rate. Just because a permittee may be able to replace wells after-the-fact, does not mean that it is conducting

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[26] Hill, V.2 at 153.

[27] Specifically Section 3311(g) of the Noncoal Act requires:

> Any surface mining operator who affects a public or private water supply by contamination, interruption or diminution shall restore or replace the affected supply with an alternate source of water adequate in quantity and quality for the purposes served by the supply. . .

Act of December 19, 1984, P.L. 1093, *as amended*, 52 P.S. § 3311(g).

its operation in order to minimize impacts to the hydrologic balance and does not mean it will continue to be able to do so. Moreover, once the Permittee begins to have difficulty replacing wells, the damage to water resources may have been done. By requiring that mining operations be conducted in a way that *minimizes* hydrologic imbalance, the regulations and statute clearly contemplate a more proactive approach to the protection of water resources.

In sum, it is clear that the Department did not adequately consider whether the continued average discharge rate of 4 mgd in the NPDES renewal application demonstrated that the Permittee was conducting its mining operation in a way that minimizes disturbance to the hydrologic balance of the Primrose Creek Basin. We therefore remand this permit to the Department for further consideration.

However, we are not insensitive to the Permittee's need to meet the needs of its mining operation. The Appellant argued that the current NPDES permit could conceivably authorize the Permittee to pump 4 mgd each day of the year, and still meet the limit in the NPDES permit. Therefore, our order limits the pumping by the Permittee to only the level necessary to keep its working pit dry enough to meet its production needs. However, there was no evidence which provides a basis for setting an upper limit at a volume different than 4 mgd on a monthly average. Therefore, during the pendancy of the Department's review of NPDES permit, we will permit this as the maximum discharge volume. This discharge rate will serve the needs of the Permittee in continuing its mining operation and provide the Department with a starting point for developing a different limitation as its study of the hydrology of the Primrose Creek Basin may indicate.

Accordingly, we make the following:

CONCLUSIONS OF LAW

1. The Board's review is *de novo. Pequea Township v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998).

2. The Appellant bears the burden of proving by a preponderance of the evidence that the Department erred in approving the renewal of the permit. 25 Pa. Code § 1021.122(c)(2).

3. The Appellant's appeal is not barred by the doctrine of administrative finality because it challenges the continuation of the permit and is not a collateral attack upon past permits.

4. The Department may not approve the renewal of an NPDES permit if by doing so other permits or regulations will be violated. 25 Pa. Code § 92.13(b)

5. A noncoal mining operation must minimize disturbances to the prevailing hydrologic balance and changes in the quantity of groundwater shall be minimized. 25 Pa. Code § 77.521.

6. The NPDES permit renewal application did not contain sufficient information for the Department to conclude that the noncoal mining operation was continuing to minimize disturbance to the hydrologic balance, including the quantity of available groundwater.

7. The Department did not adequately investigate whether the approval of the pumping rate proposed in the NPDES renewal application would enable the Permittee to minimize disturbance to the hydrologic balance of the Primrose Creek Basin.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SOLEBURY TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2002-288-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW HOPE CRUSHED STONE AND LIME COMPANY, Permittee	:	

ORDER

AND NOW, this 5th day of March, 2004, in the matter of the appeal of Solebury Township it is hereby ordered that the October 9, 2002 Permit Correction of Existing Permit #7974SM3C4 Renewal of NPDES #PA0595853 is **VACATED** and **REMANDED** to the Department for further consideration as follows:

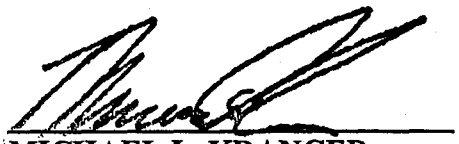
1. The Department shall consider what limit or limits are necessary and proper on a monthly average or other measure as the Department may deem appropriate to minimize disturbance of the prevailing hydrologic balance of the Primrose Creek Basin;
2. The Department shall conduct or shall require the Permittee to conduct an in depth hydrologic study of the Primrose Creek Basin and shall consider whether additional discharge limits should be placed upon the permit in order to minimize disturbance to the hydrologic balance of the basin particularly during times of drought.
3. The Department shall amend the permit to authorize the Permittee to discharge no more than necessary to keep its pit dry enough to meet its production needs, but in

no event shall the Permittee discharge more than 4 mgd on a monthly average until the Department completes its review pursuant to Paragraphs 1 and 2 of this order.

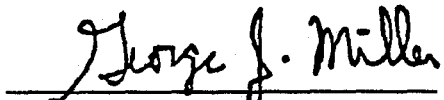
4. All other conditions and requirements of the NPDES permit remain in full effect.

Jurisdiction relinquished.

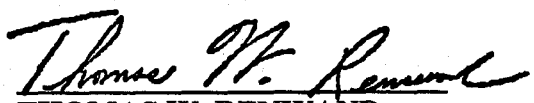
ENVIRONMENTAL HEARING BOARD



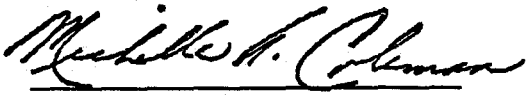
MICHAEL L. KRANCER
Administrative Law Judge
Chairman



GEORGE J. MILLER
Administrative Law Judge
Member



THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: March 5, 2004

c: DEP Bureau of Litigation
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

LOWER MOUNT BETHEL TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2003-117-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EASTERN INDUSTRIES, INC.	:	**Issued: March 11, 2004**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis

The Board grants a motion for summary judgment filed by the permittee in an appeal of the renewal of an NPDES permit issued in connection to the operation of a quarry. The appealing municipality failed to provide specific objections to the action of the Department in its notice of appeal as required by the Board's rules of procedure.

OPINION

Before the Board is a motion for summary judgment filed by Eastern Industries, Inc. (Permittee) seeking dismissal of the appeal of Lower Mount Bethel Township from the Department's approval of the renewal of an NPDES permit issued in connection with the Permittee's Martin's Creek operation. The Permittee seeks dismissal on two grounds: (1) the Township failed to detail any objections to the permit renewal; and (2) the Township failed to submit expert testimony or an expert report setting forth any basis for

appeal. We agree that this appeal must be dismissed because the Township completely failed to set forth any objections to the issuance of the permit.

The Board's rules are very clear that an appeal must set forth specific objections to an action by the Department:

> The appeal shall set forth in separate numbered paragraphs the *specific* objections to the action of the Department. The objections may be factual or legal. . . .[1]

The Board is fairly liberal in allowing broadly worded objections,[2] but a general allegation that the Department abused its discretion or violated the law alone is insufficient to preserve an objection.[3] Further, an appellant has several opportunities to raise specific objections after a notice of appeal is filed. An appeal may be amended as of right within 20 days after filing.[4] Thereafter, an appellant may seek leave of the Board to add objections to an appeal.[5] The Commonwealth Court has held many times that failing to specify an objection to a Department action waives that objection.[6]

The Township in its notice of appeal provided the following as an objection to the Department's renewal of the NPDES permit:

> Objection to Pennsylvania Department of Environmental Protection correction of existing Permit No. 74740303A4 per Application dated February 19, 2003 renewing NPDES Permit No. PA0594334. It is specifically noted that the attached Notice of Permit Correction is considered an

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[1] 25 Pa. Code § 1021.51(e)(emphasis added).

[2] *E.g., Croner, Inc. v. Department of Environmental Resources,* 589 A.2d 1183 (Pa. Cmwlth. 1991); *Ainjar Trust v. DEP,* 2000 EHB 75.

[3] *Williams v. DEP*, 1999 EHB 708.

[4] 25 Pa. Code § 1021.53(a).

[5] 25 Pa. Code § 1021.53(b).

[6] *E.g., Fuller v. Department of Environmental Resources,* 599 A.2d 248 (Pa. Cmwlth. 1991). See also 25 Pa. Code 1021.51(e).

addendum to the original permit issued on March 14, 1975, and any subsequent revisions or corrections.[7]

The Township never filed any amendments to its notice of appeal either before or after the 20-day amendment period. In its motion for summary judgment the Permittee specifically averred that "[Township] at No. 3 of the Notice of Appeal failed to set forth an objection to the renewal of the Permit", which in its response to the motion the Township admits.[8] The Township offers no explanation or excuse. The Township offers no discovery responses which may provide a clue as to its objections to the NPDES permit. We have no choice but to dismiss the appeal for failing to specify any objections.

The Township attempts to plead a "New Matter" in its motion for summary judgment claiming that it received inadequate notice of the permit correction and was not provided an opportunity to participate in the permitting process, and that the quarry is an "eyesore." As explained above, this basis for objection was waived by failing to raise it in the notice of appeal.[9]

In sum, we find that the Township failed to provide any basis for objecting to the Department's issuance of the NPDES permit. Without objections, there are no facts for hearing and no basis upon which the Board can grant relief. Therefore we have no choice but to grant the Permittee's motion and dismiss the Township's appeal. We therefore enter the following:

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[7] Notice of Appeal at No. 3; Motion for Summary Judgment Ex. A.

[8] Motion for Summary Judgment ¶ 2; Response ¶ 2.

[9] We further note that the bulk of the Township's memorandum of law is devoted to a recitation of the standard for summary judgment, yet it failed to attach one exhibit in support of its position in its motion and provides no legal basis for the claim that the Department was required to provide it with notice of the application or the Department's action. Even if the objection was not waived, we could not have provided any relief.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LOWER MOUNT BETHEL TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2003-117-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EASTERN INDUSTRIES, INC.	:	

ORDER

AND NOW, this 11th day of March, 2004, the motion for summary judgment filed by Eastern Industries Inc. is hereby **GRANTED**. The appeal of Lower Mount Bethel Township is dismissed.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: **March 11, 2004**

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

WHEATLAND TUBE COMPANY - DIVISON OF JOHN MANEELY COMPANY	:	
v.	:	**EHB Docket No. 2003-221-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 16, 2004**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr.

Synopsis:

The Department issued an NPDES permit for a manufacturing facility in 1996. The permittee applied for a permit renewal in 2001. Review of the renewal application took several years. The parties debated a change in the permit's effluent limits in the context of the renewal application. During that ongoing review process, the Department approved a separate application to transfer the permit by issuing a permit amendment naming a new owner of the facility as the permittee. The new owner stepped into the shoes of the old permittee and continued to pursue the changes in effluent limits in the context of the renewal application. The Department eventually approved the renewal, changing some effluent limits and retaining others. The permittee, particularly disappointed by the decision to retain the permit limit for iron, appealed from the renewal. The Board rejects the Department's argument that the appeal from renewal action is barred by the failure to appeal from the 1996 permit, an earlier transfer of the

permit, or the latest permit transfer. Administrative finality is held not to apply.

OPINION

The NPDES permit that is the subject of this appeal was first issued to Armco, Inc. in 1996. There was no appeal from that permit. The Department of Environmental Protection (the "Department") approved a transfer of the permit to AK Steel Corporation in 1999. There was no appeal. AK Steel applied to renew the permit in 2001. AK Steel sought some changes in the terms of the permit. The review process for the renewal application took several years to complete. The Environmental Protection Agency participated in the review. The Department took final action on the application on July 29, 2003. The Department changed some permit terms and left some the same. This appeal is brought from the Department's July 29, 2003 action.

The Department has filed a motion for summary judgment,[1] which the Appellant has opposed. The Department argues that the doctrine of administrative finality precludes assertion of the issues that are being raised in this appeal. The Department's argument is based upon the fact that, during the years that the permit renewal application was undergoing its administrative review, Wheatland Tube Company – Division of John Maneely Company ("Wheatland"), in a separate application, applied for and obtained a transfer of the permit from AK Steel. The transfer application only related to the change in ownership. It did not implicate the permit limits. Wheatland stepped into the shoes of AK Steel and continued to pursue the change in permit limits in the context of the multiyear review of the renewal application.

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[1] The Board rules upon summary judgment motions in accordance with 25 Pa. Code § 1021.94(b), Pa.R.C.P. 1035, and the numerous cases decided thereunder. *Holbert v. DEP*, 2000 EHB 796, 807-08.

In arguing a bar of administrative finality, the Department points out that the permit limit for iron, which appears to be the major point of contention, has not changed since 1996. There were no appeals from the original permit, an earlier transfer of the permit, or the transfer from AK Steel to Wheatland that took place during the review of the renewal application. The Department contends that the absence of appeals from those actions precludes Wheatland's appeal from the renewal action. Wheatland was allowed to submit comments and otherwise participate in the review of the renewal application, but in the end, Wheatland was required to accept whatever changes the Department made or did not make. Wheatland effectively waived any appeal rights by obtaining a transfer of the permit through a separate application process. Notwithstanding the ongoing renewal process, Wheatland's only option was to forego a permit transfer, terminate the renewal process, and apply for an entirely new permit.

The Department is, of course, wrong. We start with the basic point that a permittee is not forever precluded from challenging permit terms once a permit is issued. Procedures are available for modifying a permit. So long as proper procedures are followed – and there is no complaint here that it was improper to pursue permit changes in the context of the permit renewal application – a permittee may seek changes and appeal from the Department's final decision regarding those changes. The doctrine of administrative finality was never intended to insulate a permit from any changes or review of those changes for all of time.

That these types of issues tend to arise on a regular basis in Board appeals is due to the fact that Departmental permits, sewage plan approvals, and the like last a long time. They need to be reviewed and possibly updated or modified over time, but the basic, organic document remains in place. When those changes, renewals, or updates are made, the question often arises

as to what can and cannot be challenged in an appeal from the change, renewal, or update.[2]

In evaluating a claim of administrative finality, it is critically important to determine precisely what action is being appealed. Only issues that relate to *that action* may be raised. An appellant may not use the occasion of an action that takes the form of a change, renewal, or update to challenge whether the original permit should have been issued in the first place.[3] Similarly, the appellant may not use the occasion of the most recent change to challenge changes that were finalized in earlier modifications. The appellant is limited to challenging whether the current change is appropriate. That challenge will turn on the factors relevant to the current change, which may or may not resemble factors that were considered when the original action was taken.

These principles are illustrated in *Jai Mai, Inc. v. DEP*, EHB Docket No. 2001-196-L (Opinion and Order, April 29, 2003). In that case, an appellant attempted to challenge permit terms in an appeal from the transfer of the permit. The only action taken by the Department in the context of the transfer permit, however, was an approval of the change in the permittee. No other permit terms were considered or affected by the transfer. Therefore, the appellant was free to question whether a new permittee should have been approved, but it was not appropriate for it to challenge preexisting terms that were outside of the scope of the transfer decision. *Id.*, slip op. at 3. *Cf. Wurth v. DEP*, 2000 EHB 155, 183-84 (Labuskes concurring) (third-party appellants in permit transfer case only have standing to question the permit transfer, not the original permit). The appellant in *Jai Mai* happened to be the permit transferee. As such, it obviously did not

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[2] A similar problem is presented in cases where the Department is required to take sequential actions regarding the same project. *See, e.g., Perkasie Borough Authority v. DEP*, 2002 EHB 764 (sewage treatment facilities).

[3] Similarly, an appellant in a multilevel approval case may not use a later sequential step to challenge decisions made and actions taken at an earlier step. *Perkasie Borough*.

object to the appropriateness of the transfer, but it instead improperly attempted to use the transfer as a vehicle for challenging the substantive, preexisting terms of the permit that was being transferred. Those terms, however, were simply not the subject of the transfer. There were no other issues in the appeal. Accordingly, we dismissed the entire appeal.

Similarly, in *Winegardner v. DEP*, 2002 EHB 790, a citizen appealed from the last in a series of updates to a municipality's Act 537 plan. Most of the issues raised in the appeal, however, actually related to matters that had been the subject of earlier, unappealed plan updates. We held that those issues that questioned earlier updates were not the proper subject of the appeal and they were dismissed. We stated as follows:

> Our role is necessarily circumscribed by the Departmental action that has been appealed. Our responsibility is limited to reviewing the propriety *of that action*. We may not use an appeal from one Departmental action as a vehicle for reviewing the propriety of prior Departmental actions. It follows that only objections that relate to the propriety of the action under appeal are directly relevant. Objections to a different Departmental action are beside the point of our inquiry.

Winegardner, 2002 EHB at 792-93 (citation omitted, emphasis original).

Yet another twist on this principle is illustrated in *Tinicum Township v. DEP*, 2002 EHB 822. That case involved an appeal from an NPDES permit renewal. The Department argued that the Board was only permitted to consider whether the permit limits had changed, and if so, whether the changes were appropriate. We rejected the argument. We explained that, even in the absence of changes to permit terms, the five-year renewal requirement required the Department to ensure that a permit issued years earlier was still appropriate based upon what was known at the time of the proposed renewal. The determinative issue was *not* whether the permit was appropriate in the first place; it was whether it should have continued in place for another five years. Challenges related to the former were barred; challenges related to the latter were

held to be properly the subject of Departmental consideration and Board review. *See Tinicum*, 2002 EHB at 833-36. The Board employed the identical analysis in rejecting the Department's administrative finality argument only a few days ago in *Solebury Township v. DEP*, EHB Docket No. 2002-288-MG, slip op. at 18-20, 28 (Adjudication, March 5, 2004).

Returning to this case, Wheatland appeals *from the permit renewal.* The renewal addressed changes in the permit terms, after lengthy debate, allowing some changes and disallowing others. Wheatland's appeal relates to those permit terms. Unlike the appellants in *Jai Mai* and *Winegardner*, Wheatland is appealing from the correct action. In fact, it is the only action that would support this appeal. As illustrated in *Jai Mai*, Wheatland could not have raised the issues that it raises in this appeal in an appeal from the permit transfer. Had it attempted to do so, its appeal from those issues would have been dismissed.

In this case, there were two separate permit-related applications and two separate Departmental actions that overlapped in time but not in substance. The Department approved the application to transfer the permit from AK Steel to Wheatland by issuing an amendment to the permit. Wheatland's appeal is not from that permit amendment. Wheatland is obviously not questioning whether it was appropriate for there to be a new permittee or the identity of the new permittee. Rather, Wheatland's appeal is from the Department's renewal of the permit, a distinct and separate action from the issuance of the permit amendment. The two applications and two Departmental actions involved entirely separate issues. The permit amendment involved a change in ownership; the renewal application did not. Conversely, the renewal application involved proposed changes in effluent limits; the permit amendment did not.

The Department's argument that Wheatland is somehow barred from bringing the challenges raised here by the original permit issuance and an earlier transfer also ignores the fact

that the permit limit changes were obviously not proposed, considered, or acted upon in those earlier actions. Wheatland is not raising now something that could have been appealed earlier. *See Moosic Lakes Club v. DEP*, 2002 EHB 396, 406 (The purpose of the doctrine of administrative finality "is to preclude a collateral attack where a party could have appealed an administrative action but chose not to do so.")

The Department here, as in *Tinicum* and *Solebury*, relies heavily upon the fact that the permit limit for iron, the primary issue in this appeal, has not changed since 1996. That is not the point. It makes no difference with respect to appealability whether the Department's final decision is to accept or reject the changes. Appealability does not turn on the results of the review. The key question is not whether any properly requested changes were approved, it is whether they were considered and acted upon.

In its reply, the Department argues that it is entitled to summary judgment because Wheatland has failed to show that there is a genuine issue of fact regarding the effluent limitation for iron. The Department gets into a rather detailed discussion regarding the history and merits of its decision to "reimpose" (see Ex. 2) the same iron limit that existed in the permit from the beginning. The merits of the Department's decision to change some limits but reimpose the iron limit, however, are entirely beside the point of administrative finality. If anything, the Department's reply demonstrates beyond any doubt that the Department gave the matter of the iron limit its fullest attention in the context of the renewal process. When it comes to the Department's claim of administrative finality, the reasons for the Department's decision are just as irrelevant as the fact that the Department rejected Wheatland's request to change the limit instead of granting it. Wheatland's opposition to the Department's motion did not create an issue

of fact regarding the merits of the iron decision because to do so would have been premature and outside of the scope of the Department's administrative finality claim.

Finally, the Department is also incorrect to the extent that it is suggesting that Wheatland waived its right to pursue this appeal from the renewal decision when it agreed to the permit transfer. Wheatland was certainly bound by the preexisting permit limits by virtue of the transfer, *Jai Mai*, slip op. at 2-3, but Wheatland's promise to abide by the terms of the permit did not constitute a waiver of its right to *ever* pursue permit changes at an appropriate time and utilizing proper procedures. Absent an approved change, Wheatland obviously was required to comply with its new permit, but that is not to say that Wheatland could never seek to change the permit and pursue appropriate appeals if necessary. In this case, it just so happened that a proper request to change was already pending. The transfer committed Wheatland to comply with the existing permit limits pending the results of that renewal, but in no way committed it to forego its rights with respect to the renewal process.

There is nothing in the record to suggest that Wheatland intended to, or was advised that, or reasonably should have understood that agreeing to the transfer constituted a waiver of appeal rights with respect to the pending renewal application. The permit renewal process that was ongoing at the time of the transfer continued unabated. Among other things, the Department requested and received additional materials from Wheatland and otherwise engaged in review of the renewal application that does not appear to have been interrupted in any way by the change in plant ownership. There is no indication of an actual or implied waiver. *See Fuentes v. Shevin*, 92 S.Ct. 1983 (1972) (courts indulge every reasonable presumption against waiver of procedural due process rights); *Com. v. Monica*, 597 A.2d 600 (Pa. 1991) (presumption must always be against waiver of constitutional right); *Keenan v. Scott Township Authority*, 616 A.2d 751 (Pa.

Cmwlth. 1992) (mere inference of relinquishment of claim is not legally sufficient to constitute waiver).

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WHEATLAND TUBE COMPANY - DIVISON OF JOHN MANEELY COMPANY	:	
v.	:	**EHB Docket No. 2003-221-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 16th day of March, 2004, the Department's Motion for Summary Judgment is denied. Wheatland's request to file a surreply is denied as moot.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: **March 16, 2004**

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

EIGHTY-FOUR MINING COMPANY	:	**EHB Docket Nos. 2003-181-K**
	:	**(Consolidated with 2003-175-K,**
v.	:	**2003-176-K, 2003-177-K,**
	:	**2003-178-K, 2003-179-K,**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**2003-180-K)**
	:	
	:	**Issued: March 17, 2004**

OPINION AND ORDER ON DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT

By: Michael L. Krancer, Chief Judge and Chairman

Synopsis:

The Board denies the Department's Motion For Summary Judgment which had argued that the matter is moot. The "termination" of various orders under the Bituminous Coal Mining Act does not make the matter moot. Furthermore, the matter at issue is capable of repetition yet likely to evade review.

Factual and Procedural Background

Before us is the Department of Environmental Protection's (DEP or Department) Motion For Summary Judgment seeking dismissal for mootness of this appeal of seven DEP orders. The essence of the argument of the motion is that the compliance and cessation orders appealed from are now fully complied with, have been "terminated" and cannot form the basis for any tangential or collateral adverse effect upon Appellant in the form of potential later fines, penalties or adverse action on future permitting decisions.

The material facts are not disputed. Appellant Eighty-Four Mining Company (EFM) owns and operates an underground coal mine located in the Borough of Eighty Four, Washington County (Mine 84). On January 6, 2003, a fire started in Mine 84 along a conveyor belt located in a section of the mine called the 1B longwall panel. The fire was fully extinguished on January 27, 2003. DEP and the federal Mine Safety and Health Administration (MSHA) began an investigation of the fire accident on January 16, 2003 which they completed in early February. This led to the resumption of mining in Mine 84 on February 12, 2003, including mining along the 1B longwall panel. At the close of their investigations, DEP and MSHA issued separate reports detailing their findings. MSHA issued its report in April 2003 and DEP issued its report in late June 2003.

Long after the fire was extinguished, DEP issued the seven compliance and/or cessation orders that are at issue in this appeal. It was not until July 11, 2003 that DEP issued the Orders which state that they are issued pursuant to the Pennsylvania Bituminous Coal Mine Act (BCMA)[1] and the Administrative Code. The Orders alleged that certain unsafe conditions pertinent to the fire accident existed in the 1B longwall panel at the time of the accident, and that these conditions constitute violations of the BCMA. The orders directed EFM to take specific actions to remedy the unsafe violative conditions and to conduct training of its employees with respect to adequate fire prevention and the proper response to an incident of fire in the mine.[2]

EFM filed separate appeals from each of the seven compliance orders on August 7, 2003

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[1] Act of July 17, 1961, P.L. 659, as amended, 52 P.S. § 701-101 *et seq.*

[2] *See* Notice of Appeal, Dkt. No. 2003-175-K, at exhibit A (appealing Compliance Order No. 273-201); Notice of Appeal, Dkt. No. 2003-176-K, at exhibit A (appealing Compliance Order No. 273-202); Notice of Appeal, Dkt. No. 2003-177-K, at exhibit A (appealing Compliance Order No. 273-203); Notice of Appeal, Dkt. No. 2003-178-K, at exhibit A (appealing Compliance Order No. 273-204); Notice of Appeal, Dkt. No. 2003-179-K, at exhibit A (appealing Compliance Order No. 273-205); Notice of Appeal, Dkt. No. 2003-180-K, at exhibit A (appealing Compliance Order No. 273-206); Notice of Appeal, Dkt. No. 2003-181-K, at exhibit A (appealing Compliance Order No. 0241122).

and the related appeals were consolidated by order dated September 17, 2003. In its notices of appeal, EFM objected to the orders on the basis that no violations ever existed and that, in any event, DEP did not have statutory authority under the BCMA or the Administrative Code to issue the orders. In effect, EFM seeks to have the Board rescind or vacate the seven Orders.

EFM does not dispute that it has fully complied with both the remedial and training directives in each of the seven compliance orders.[3] In fact, many of the orders state that the conditions cited in the orders were "corrected before coal production resumed." *See* Order Nos. 273-201; 273-202; 273-203; 273-205; 0241122. Following the January 2003 fire accident, coal production resumed in Mine 84 on February 12, 2003, so these conditions were remedied by that date. Indeed, mining of the 1B longwall panel had been completed in early June 2003, prior to the issuance of the seven orders.[4] As of August 2003, EFM had also complied with the training directives in the compliance orders.[5] EFM having complied with all obligations imposed by the seven compliance orders, DEP has "terminated" the orders.[6]

Under the BCMA there is no authority for DEP to impose civil penalties for violative conduct. Thus, the orders would not have a potential future detrimental impact upon EFM with respect to potential civil penalty liability or any civil penalty escalation formula. Also, there is no "compliance record" or "violations history" provision of the BCMA which would see these orders playing a detrimental role in EFM's future permitting prospects.

DEP asserts that these appeals have been rendered moot by EFM's compliance with all

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[3] DEP Motion, at ¶¶ 9-23; EFM Amended Response to Motion, at ¶ 7; EFM Memorandum in Opposition to the Motion, at pp. 4-9.

[4] EFM Amended Response to Motion, at ¶ 7.

[5] EFM Amended Response to Motion, at exhibit A (Todd Moore Affidavit, at ¶ 19); exhibits D, F, H, J and M.

[6] *See* DEP Motion, at ¶ 9; EFM Memorandum, at 13.

obligations imposed by the seven compliance orders, combined with the fact that the orders can have no tangential future detrimental impact on EFM—for example, as part of a violation history that could be used in civil penalty escalation provisions or permitting decisions. DEP argues that the Board will not be able to grant any meaningful practical relief to Appellant under the circumstances, that EFM no longer has the necessary stake in the outcome, and consequently these appeals should be dismissed.

EFM says the case ought not to be dismissed on mootness grounds. While EFM agrees that there is no tangential detrimental effect of the issuance of the seven orders in terms of penalty liability or danger to its future ability to obtain permits, it does claim that the issuance of the orders, in and of itself, represents a continuing stigma inflicted "because of the publication of the allegations by the Department." It further argues that public policy favors continuing on with the case because to do otherwise would be to create a disincentive for mine operators to immediately comply with compliance and/or cessation orders. In this regard, EFM states that the mining laws are of a "remedial purpose" and that DEP's position here that the operator's compliance with the orders makes the case moot is "inconsistent with the remedial purpose of the Act and the overall enforcement scheme of the Act". Finally, EFM argues that one or more of the various exceptions to the mootness doctrine should apply. It states that the issues raised in this case regarding these orders are of significant public importance. Specifically, the appeals raise very important questions about the authority of DEP under the BCMA as well as various important statutory interpretation questions about the BCMA.

Oral argument on the Department's motion was held in Pittsburgh before Judges Krancer and Renwand on February 3, 2004. The transcript of that argument has been made part of the record we review in passing on the motion.

Standard of Review

The Board may grant a motion for summary judgment where the pleadings, depositions, answers to interrogatories, admissions of record and affidavits show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. 25 Pa. Code § 1021.94(b); Pa. R. Civ. P. 1035.2; *County of Adams v. DEP*, 687 A.2d 1222, 1224 n.4 (Pa. Cmwlth. 1997); *Holbert v. DEP*, 2000 EHB 796, 807-08. When deciding summary judgment motions, the Board views the record in the light most favorable to the non-moving party. *Allegro Oil & Gas, Inc. v. DEP*, 1998 EHB 1162, 1164.

Discussion

We decline to dismiss this matter as moot at this time. The Department is wrong in the fundamental theory of its motion that the Board cannot grant effective relief. There certainly is effective relief that the Board can grant. It can rescind or vacate the orders if Appellant proves its case, a step the Department has declined to undertake itself.

The prominent aspect of this case at this point as we see it is the dissonance of the Department's claim that seven orders, which it took the trouble to issue months after the allegedly offensive conduct had ceased and been corrected, are of such little moment as to be moot. If they are moot, then why were they issued in the first place at the particular time they were issued? More interestingly, if they are moot, why has the Department either refused or declined to rescind them? The actions of the Department in issuing seven orders well after the supposedly violative conduct had been corrected, maintaining them and not rescinding them belies the notion that they are moot and of no further interest. They must have some continuing effect. To conclude otherwise is to conclude that the Department engages in meaningless and useless actions. We do not view the Department as a Don Quixote Agency.

Moreover, viewing the record in the light most favorable to EFM, which we must do, it does not appear that we can definitively say that the orders have no continuing effect. In fact, on its face one of the orders requires that "all active [conveyor] belts must be maintained in a safe operating condition" and it further annunciates that such safe operating condition means "the belt must be trained so that it does not come in contact with the structure and all defective rollers must be taken out of service and replaced."[7] Moreover, we cannot conclude definitively that, even if these particular orders have been complied with, they have not established certain continuing obligations and requirements on the part of EFM, particularly the obligation to provide certain training and the requirements relating to operation of conveyer belts and fire protection systems. As such, the orders standing by themselves establish prescriptive standards for on-going and future operations. The question, of course, is whether the Department enunciated the prescriptive standards outlined in these orders in a manner consistent with and allowed by the BCMA and whether the prescriptive standards themselves are consistent with the substantive requirements of the BCMA. Those questions, at least as long as these orders are still extant (we have more comment about that in the following paragraphs) are live and justiciable and for which the Board can, as we have demonstrated, provide meaningful relief in the form of rescission of offensive orders if EFM is correct in its challenges in whole or in part.

The fact that the orders were "terminated" is not of dispositive significance in this case in the analysis of whether the matter is moot. This notion of "terminating" an order appears to be borrowed from the concept of "lifting" an order in the surface mining program, where a continuing violation could create a bar to obtaining permits. Thus, terminating an order has

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[7] The referenced order is order no. 273-205. It provides in the section which directs corrective action that, "the 1B longwall belt conveyor and all active belts must be maintained in a safe operating condition. The belt must be trained so that it does not come in contact with the structure and all defective rollers must be taken out of service and replaced." Notice of Appeal, Docket No. 2003-179-K.

practical meaning in the surface mining context. Not so under the BCMA. The Department admits that terminating the orders in this case has no practical significance. More significantly, the "termination" of the orders at issue in this case has no *legal* significance in terms of the status of the orders themselves; they are still extant.

On the other side of the coin, if we were to accept the Department's theory that "termination" is the key, we would be anointing that concept with monumental legal significance. Namely, "termination" of an order would prescriptively deprive an operator of its opportunity to seek review before the Board. We decline to attach that rank of significance to the concept. Whatever the meaning of "termination" in a BCMA case, it certainly should not be granted the status of being the measure of whether we will hear an appeal.

"Terminating" an order is to be contrasted with rescinding or revoking one and we have before noted that critical difference with reference to a mootness analysis. In *Goetz v. DEP*, 2001 EHB 1127, we noted,

> The Board has examined the question of mootness in numerous cases where a compliance order which forms the subject of an appeal has subsequently been withdrawn or vacated by the Department. *See, e.g., West v. DEP*, 2000 EHB 462; *Kilmer v. DEP*, 1999 EHB 846; *Power Operating Company v. DEP*, 1998 EHB 466. Where DEP has acted to rescind its prior appealable action, the Board has generally not hesitated to dismiss such appeals as moot. *Pequea Township v. DER*, 1994 EHB 755, 758. A revoked compliance order no longer exists, and thus the Board cannot provide any meaningful relief with regard to it; moreover, a vacated compliance order cannot serve as the basis for any future civil penalties, or be considered in permit or license reviews. *West*, 2000 EHB at 463; *Kilmer*, 1999 EHB at 848.[3]
>
> A different situation is presented where DEP issues a compliance order, the order is appealed, the appellant complies with the order, and DEP then "lifts" the order because it has been satisfied. *See Al Hamilton Contracting Co. v. DER*, 494 A.2d 516 (Pa. Cmwlth. 1985); *Harriman Coal Corporation v. DEP*, 2000 EHB 954. When a compliance order has been lifted due to satisfaction of its terms, the compliance order retains its validity and can continue to have a tangential impact on the recipient. The *Al Hamilton* case illustrates the point.

Goetz, *supra* at 1132. In the footnote associated with that text we stated that,

> Although a multiplicity of terms may be used to describe the Department's action in those appeals—withdraw, vacate, revoke, rescind—the intent was the same: to make void a previously-issued order. *See* American Heritage Dictionary 1545 (3d ed. 1992) (defining "revoke" as "to void or annul by recalling, withdrawing, or reversing; cancel; rescind"); Webster's Third New International Dictionary 1930 (1986) (defining "rescind" as "to take back; annul, cancel; to vacate or make void"); *id.* at 2527 (defining "vacate" as "to make of no authority or validity; make void; annul").

Id. at 1132 n.3. *See also Horsehead Development Company, Inc. v. DEP*, 780 A.2d 856 (Pa. Cmwlth. 2001) (matter is moot where order is rescinded); *Solebury Township v. DEP*, EHB Docket No. 2002-323-K, slip. op. at 8 (Opinion issued January 16, 2004) (rescission erases the Department's action to which Appellants had objected leaving the Board unable to grant any relief and with no extant case or controversy to decide).

During oral argument we directed an inquiry to counsel on the subject of this distinction between "terminating" and "rescinding" or "revoking" an order in the context of mootness analysis in general and this case in particular. It appeared then that the Department had not considered as of that time the possibility of having the orders in this case revoked or rescinded. The Department has declined to take that action and to present us with the question whether the case is moot in that scenario. Even counsel for the Appellant admitted at oral argument that if the orders had been or were to be rescinded, there would be no effective relief that the Board could grant. We agree with that assessment. Just recently in *Solebury Township v. DEP*, *supra*, where the Department had rescinded its action there under appeal, we observed that "[t]he rescission has erased the Department's action to which Appellants have objected leaving the Board unable to grant any relief and with no extant case or controversy to decide". *Id.* slip op. at 8.

Given that we are dealing here with extant orders from which we could grant relief if warranted, we believe that the particular attributes and structure of the BCMA taken together

with its paramount concern for safety combine to place this case within the exception to the mootness doctrine applicable to matters which could easily recur and would evade review.

As we have noted, the BCMA lacks both civil penalty authority and compliance history permit block authority. Those two components, if present, would serve to prevent a case like this one from being considered moot. Those attributes of the analogous Noncoal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. § 3301 *et seq.* (NSMCRA) have had that effect in the past. *See Al Hamilton Contracting Co. v. DER*, 494 A.2d 516 (Pa. Cmwlth. 1985); *Goetz v. DEP,* 2001 EHB 1127. The absence of these types of provisions in the BCMA is then overlain by the BCMA's primary and sole purpose; the protection of the health and safety of those who practice their vocation down inside deep mines. It is beyond dispute that the primary if not the sole purpose of the BCMA is protection of persons who work in mines. The Department has stipulated in a previous BCMA case that, "the primary purpose of the BCMA is to provide for the health and safety of persons employed in and about underground coal mines." *UMW v. DEP*, 2001 EHB 1040, 1086 n.7 (emphasis added). Section 104(a) of the BCMA specifically directs the secretary "to protect the health and promote the safety of all persons employed in and about the mines." 52 P.S. § 701-104(a). In addition, the Board has also recognized that protection of miners is the primary purpose of the BCMA. We have stated that "the intent of the [BCMA] is . . . the protection of the health and safety of those employed in and around bituminous coal mines." *Pennsylvania Mines Corp. v. DER*, 1991 EHB 1348, 1372. Indeed, such questions can be of life and death significance to those in the rank and file workforce and management alike whose vocation takes them into a deep mine.

Given that degree of emphasis on safety in the BCMA, we agree with EFM that there ought to be a mindset that safety orders issued under the BCMA be complied with immediately,

even in the face of some degree of doubt in the mining company's mind about whether DEP has the underlying statutory authority to issue a particular order or whether the measure or measures ordered is or are in some respect, perhaps, not in concert with the BCMA. At the very least, there ought not to be created a disincentive to immediate compliance. Such a disincentive would clearly be destructive to the very fabric of the main point of the BCMA. Were we to force a mine operator to disobey a BCMA safety order in order to preserve its right to challenge it, we would be creating a disincentive to compliance. To do so would, thus, be increasing the dangers to miners which would be directly contrary to the seminal if not the only purpose of the BCMA.

Supersedeas proceedings, although theoretically available upon the issuance of a BCMA safety order, do not completely address the dilemma presented by this unique combination of factors that we see operating in the BCMA setting. First, where a mine operator's right of review is cut off unless it disobeys a BCMA order and files a supersedeas, that creates disincentive for immediate compliance which disincentive we have just demonstrated is contrary to the sole purpose of the BCMA. Second, supersedeas relief, even if justified, may not be available for some period of time. During that time the order is in limbo, presumably not being complied with. Third, the crucible of supersedeas litigation with its abbreviated nature and time pressures is not the optimal forum to be deciding these types of questions, which are multi-faceted in terms of both the legal and factual issues presented which need resolution. As Judge Labuskes so accurately stated in *Global Eco-Logical Services, Inc. v. DEP*, 1999 EHB 649,

> It is helpful to remember that the Board is not called upon to decide the case on the merits in the context of a supersedeas application. The Board is, at most, required to make a prediction based upon a limited record prepared under rushed circumstances of how an appeal might be decided at some indeterminate point in the future.

Id. at 651. Fourth, the burden a petitioner would have to carry in supersedeas litigation regarding

a BCMA mine safety order would be most immense, more than would be the case in other supersedeas contexts. The reason for this follows from what we have already discussed regarding the BCMA's focus on safety. As we have shown, the fundamental purpose of the BCMA is the safety of those who are in the mines and that is, in fact, the overarching imperative of the BCMA. A BCMA safety order by its very nature alleges that the ordered action must be taken to protect the safety of those in the mine. When those circumstances are matched with the supersedeas standards which require that the Board weigh whether a supersedeas may result in injury to the public and which bar a supersedeas where injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect, it is not hard to see that supersedeas litigation would not be a realistic test of a BCMA order's validity.[8]

Accordingly, we enter the following order.

[8] The supersedeas standards are set forth at 25 Pa. Code § 1021.63. The standards for temporary supersedeas are set forth at 25 Pa. Code § 1021.64. Those standards set forth the same considerations regarding injury to the public.

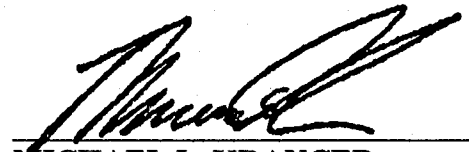
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EIGHTY-FOUR MINING COMPANY	:	
	:	
v.	:	**EHB Docket Nos. 2003-181-K**
	:	**(Consolidated with 2003-175-K,**
COMMONWEALTH OF PENNSYLVANIA,	:	**2003-176-K, 2003-177-K,**
DEPARTMENT OF ENVIRONMENTAL	:	**2003-178-K, 2003-179-K,**
PROTECTION	:	**2003-180-K)**

ORDER

And now this 17th day of March, 2004, it is hereby ordered that the Department of Environmental Protection's Motion for Summary Judgment is **DENIED**. An appropriate trial order will follow shortly.

ENVIRONMENTAL HEARING BOARD



MICHAEL L. KRANCER
Administrative Law Judge
Chairman

Dated: March 17, 2004

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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SOLEBURY TOWNSHIP, BUCKINGHAM TOWNSHIP, & DELAWARE RIVERKEEPER, DELAWARE RIVERKEEPER NETWORK & AMERICAN LITTORAL SOCIETY	:	
v.	:	**EHB Docket No. 2002-323-K (Consolidated with 2002-320-K & 2003-012-K)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, Permittee	:	**Issued: March 29, 2004**

OPINION AND ORDER ON APPLICATIONS FOR ATTORNEYS' FEES AND COSTS UNDER SECTION 307(b) OF THE CLEAN STREAMS LAW, 35 P.S. § 307(b)

By Michael L. Krancer, Chief Judge and Chairman

Synopsis:

Appellants do not qualify for recovery of attorneys' fees and costs under Section 307(b) of the Clean Streams Law because: (1) they were not prevailing parties; (2) they did not achieve some degree of success on the merits; and (3) they did not make a substantial contribution to a full and final determination of the issues. Although there was a final order dispensing with the case, the matter was dismissed upon Appellees' motion to dismiss for mootness, which Appellants opposed, prior to any determination on the merits of any issue in the case.

Factual and Procedural Background

We deal here with whether Appellant or Appellants can recover attorneys' fees and costs under section 307(b) of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35

P.S. §§ 691.1-691.1001 (CSL). This Opinion and Order is the direct sequel to our Opinion and Order dated March 4, 2004 which dealt with Appellants Buckingham Township's and Delaware Riverkeeper's applications for the recovery of attorneys' fees and costs under the Costs Act, Act of December 13, 1982, P.L. 1127, 71 P.S. §§ 2031-2035. (Costs Act). *Solebury Township v. DEP*, EHB Docket No. 2002-323-K (Opinion issued March 4, 2004)(*Solebury III*). This Opinion and Order is also a sequel to two other Opinions and Orders we have issued in this case, to wit, *Solebury Township v. DEP*, EHB Docket No. 2002-323-K (Opinion issued January 16, 2004)(*Solebury II*); *Solebury Township v. DEP*, EHB Docket No. 2002-323-K (Opinion issued February 20, 2003)(*Solebury I*). We are going to presume a familiarity with all three previously issued Opinions and Orders as a background for this Opinion and Order and, thus, we will not recite here all of the relevant factual background.

We dealt with the Costs Act applications in *Solebury III* separately from the CSL applications because of more pressing mandatory time constraints under the Costs Act. As we noted in *Solebury III*, in which we denied the applications for fees and costs under the Costs Act, we have either one or three Section 307(b) CSL applications for attorneys' fees and costs before us. *Solebury III*, slip op. at 2 n.1. The reason for the question whether we have one or three applications under Section 307(b) of the CSL is that two of the applications, Delaware Riverkeeper's and Buckingham Township's, were in the form of supplements to their previously filed applications under the Costs Act. PennDOT and DEP argued that these "supplements" should be stricken because they were filed late and in violation of the rule that applications for attorneys' fees and costs asserting the right to same under more than one statute must be brought in a single application. *Id.* We are now ready to deal with the CSL applications and, as will

become evident, it does not matter whether we have one or three applications because costs and fees cannot be awarded in any event regardless of when the applications were filed.

Discussion

Under Section 307(b) of the CSL, the following four criteria must be met to qualify for the recovery of attorneys' fees and costs:

(1) a final order must have been issued;

(2) the applicant for the fees and expenses must be the prevailing party;

(3) the applicant must have achieved some degree of success on the merits; and

(4) the applicant must have made a substantial contribution to a full and final determination of the issues. [1]

We will address these criteria in the context of this case.

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[1] In 1990 the Board established these criteria for awarding attorneys' fees and costs under section 4(b) of the Surface Mining Conservation and Reclamation Act (SMCRA) in *Kwalwasser v. DER*, 1988 EHB 1308, *aff'd*, 569 A.2d 422, 424 (Pa. Cmwlth. 1990). The Commonwealth Court later reaffirmed the use of this test in *Big B. Mining Co. v. DER*, 624 A.2d 713 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 633 A.2d 153 (Pa. 1993). In *Medusa Aggregates Co. v. DER*, 1995 EHB 414, 428, n. 7, a case involving an application for attorneys' fees and costs under both Section 4(b) of SMCRA and Section 307(b) of the CSL, the Board noted in passing in a footnote that the same criteria apply to petitions for attorneys' fees and costs filed under Section 307(b) of the Clean Streams Law, 35 P.S. § 691.307(b). Since *Medusa*, it has been reiterated by the Board, Commonwealth Court and even the Supreme Court that recovery of attorneys' fees and costs under Section 307(b) of the CSL is to be subject to the same test as is used under Section 4(b) of the Surface Mining Act. *Lucchino v. DEP*, 809 A.2d 264, 266, 267, 269 (Pa. 2002); *Lucchino v.* DEP, 744 A.2d 352, 353-55 (Pa. Cmwlth. 2000), *aff'd*, 809 A.2d 264 (Pa. 2002); *P.U.S.H. v. DEP*, 1999 EHB 914, 916; *Raymond Proffit Foundation v. DEP*, 1999 EHB 124, 127-28. All of these cases have dealt with an overlay of Section 307(b) of the CSL and Section 4(b) of SMCRA and there has not been any discrete analysis of Section 307(b) separate from the Section 4(b) SMCRA attorneys' fees and costs recovery provision. Here, we have no SMCRA overlay, as no mining statute is involved. No Appellant has suggested that a test other than the four-pronged one originating with *Kwalwasser* and developed through its progeny in connection with a SMCRA Section 4(b)/CSL Section 307(b) background should apply in a purely CSL Section 307(b) context.

We also note that in *Alice Water Protection Ass'n v. DEP*, 1997 EHB 108, the Board modified the eligibility requirements for the award of costs and counsel fees. *Alice Water* was again a combination CSL/mining statute analysis of the attorneys' fees and costs recovery question. In addition to meeting the four-pronged test set forth in *Kwalwasser*, we required a permittee seeking to recover costs and counsel fees from a third-party appellant to demonstrate that the appeal was brought in bad faith. *Lucchino v. DEP, supra*, 809 A.2d at 266. That aspect of the test would not apply here since it is the third parties who are seeking recovery, and not others seeking recovery against the third parties.

We do have a final order in this case. In *Solebury II* we dismissed the case pursuant to PennDOT's and DEP's motions to dismiss on the ground that the case was moot. Appellants had opposed the motions to dismiss.

From that point on, Appellants fail to meet any of the criteria required to justify the recovery of attorneys' fees and costs. It should be no surprise from our discussion in *Solebury III*, in which we found unequivocally that Appellants were not "prevailing parties" under the Costs Act, that they are not such under the CSL either. *Solebury III* slip op. at 7-9. The final order rendered in *Solebury II* was one dismissing the appeal, granting the relief PennDOT and DEP requested by motion, which had been opposed by all Appellants. As we noted in *Solebury III*,

> Here, of course, no adjudication on the merits was rendered. In fact, in rejecting a request by an Appellant that the Board dismiss the case "with prejudice" as to certain aspects thereof, the Board took particular note that,
>
> > ...to the extent that the notion of dismissal 'with prejudice' suggests any determination of the merits of the subjects raised in summary judgment practice, that notion is antithetical to what is being done by this Opinion and Order. *There has been no determination of any of the merits of the subjects of the summary judgment practice.*

Solebury III, slip op. at 7, *citing Solebury II*, slip op. at 12 n.2. As we further said in *Solebury III*, "by no stretch of the imagination have Appellants won anything regarding the merits of this case." *Solebury III*, slip op. at 9.

We do not accept Solebury's argument that it is a prevailing party because, as it says, "it obtained precisely the relief sought in its appeal," *i.e.*, the Section 401 Certification is gone.[2]

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[2] Solebury's points in this regard are:

> (a) PennDOT's rescission of the 401 WQC [401 Certification] was a direct result of Solebury's efforts, and the strength of Solebury's legal position before the Board.

That argument is easily dispensed with on the grounds that correlation does not suggest causation. To be a prevailing party for recovery of attorneys' fees and costs, there must be some observable cause and effect relationship between the litigant's actions in the litigation and the result. There is no basis to conclude that PennDOT's request for rescission and/or DEP's rescission were in any way a direct or even an indirect result of Solebury's efforts. The rescission was the result of PennDOT's request, which request did not specify a reason for that request. The Department's rescission letter states that the rescission was pursuant to PennDOT's request. Since there was no disposition on the merits of anyone's legal position in this case, Solebury's claim that the "strength of its legal position before the Board" caused the rescission is contention, but, unfortunately for Solebury, it is not demonstrated fact. Finally, whether PennDOT has agreed to anything with respect to any potential future request for a Section 401 Certification is beyond this litigation record.

Based on the foregoing discussion, it cannot be said that Solebury or the other Appellants have achieved some degree of success on the merits. To repeat again what we said in *Solebury II*, "[t]*here has been no determination of any of the merits of the subjects of the summary judgment practice.*" *Solebury II* slip op. at 12 n.2.[3]. No party has achieved any success on the merits of the case.

(b) PennDOT's withdrawal of the 401 WQC provided precisely the relief requested by Solebury.

(c) PennDOT has further acceded to Solebury's request that any future request for a 401 WCQ include a Section 105 permit Application.

(Solebury Application, p.3, ¶10).

[3] Based on our discussion up to this point, we will not address whether the applications of Delaware Riverkeeper and Buckingham ought to be stricken as being late and/or in piecemeal form. No application for attorneys' fees and costs under Section 307(b) of the CSL from any of the Appellants would be meritorious no matter when filed.

As for the fourth prong of the test, there has not been any full and final determination of any of the issues which had been presented in the summary judgment litigation. That requirement of the test, then, is likewise not achieved.

Solebury makes a closing argument that we will deal with in closing as well. Solebury says that allowing parties, on the eve of trial and after appellants have incurred significant litigation expenses on claims which may be meritorious, to take action which renders the case moot before any disposition on the merits, thereby escaping the costs and fee-shifting statutory provisions, is "not the system envisioned by the drafters of [Section 307(b) of the CSL]". Solebury argues that this case "illustrates the problem". It says that to fail to award costs and fees in this case to Solebury would seriously undermine the costs and fee-shifting provision and have a serious chilling effect on the willingness of parties to challenge violations of the CSL.

If this is a problem, as Solebury says it is, then it is a systemic one with Section 307(b) and how it has been applied in practice by the Supreme and Commonwealth Courts. We are constrained to review this Section 307(b) application in light of the Legislature's language in Section 307(b) and the rules regarding the application of that Section which have been set forth by the Supreme Court and the Commonwealth Court. We have done so here by measuring the application against the four criteria which are those of the Supreme Court and the Commonwealth Court. Solebury fails to meet those criteria. To award fees and costs here would be to do so in direct contravention of the specific criteria for doing so which have been endorsed by the Supreme and Commonwealth Courts. If there is a problem of which this case is illustrative, then Solebury must raise that with the Legislature for it to review or with the Commonwealth and/or Supreme Courts on appeal of this Opinion and Order.

Accordingly, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SOLEBURY TOWNSHIP, BUCKINGHAM TOWNSHIP, & DELAWARE RIVERKEEPER, DELAWARE RIVERKEEPER NETWORK & AMERICAN LITTORAL SOCIETY	:	
v.	:	**EHB Docket No. 2002-323-K (Consolidated with 2002-320-K & 2003-012-K)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, Permittee	:	

ORDER

AND NOW, this 29th day of March, 2004 Buckingham Township's and Delaware Riverkeeper's applications for Attorney's fees and costs under the Costs Act are denied.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

Judge Miller did not participate in the deliberations or decision in this matter.

DATED: March 29, 2004

c: DEP Bureau of Litigation
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
Anderson Lee Hartzell, Esq.
Southeast Regional Counsel

For Permittee DOT:
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PennDOT Office of Chief Counsel
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Harrisburg, PA 17105-8212

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Delaware Riverkeeper Network
Law Clinic
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Janine Bauer, Esq.
416 Clark Street
South Orange, New Jersey 07079

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SOLEBURY TOWNSHIP, BUCKINGHAM TOWNSHIP, & DELAWARE RIVERKEEPER, DELAWARE RIVERKEEPER NETWORK & AMERICAN LITTORAL SOCIETY	:	
v.	:	**EHB Docket No. 2002-323-K (Consolidated with 2002-320-K & 2003-012-K)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, Permittee	:	

SUBSTITUTE CORRECTED ORDER

AND NOW, this 30th day of March, 2004 upon consideration that the wrong form of Order was issued with the Opinion and Order dated March 29, 2004, the Board hereby enters this as a substitute for the form of order entered on March 29, 2004: it is hereby ordered that Solebury Township's, Buckingham Township's and Delaware Riverkeeper's applications for attorneys' fees and costs under the Clean Streams Law are denied.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

Judge Miller did not participate in the deliberations or decision in this matter.

DATED: March 30, 2004

c: DEP Bureau of Litigation
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
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Southeast Regional Counsel

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

EARTHMOVERS UNLIMITED, INC.	:	
	:	
v.	:	**EHB Docket No. 2003-108-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 30, 2004**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Pursuant to Pa.R.C.P. 1035.3(d), summary judgment is entered against an appellant for failure to respond to the Department's motion for summary judgment.

OPINION

This appeal involves the Department of Environmental Protection's (Department) disapproval of Earthmovers Unlimited, Inc. (Earthmovers) as a subcontractor on a waste tire remediation project that the Department funded in Antis Township, Blair County. The Department approved an application for a waste tire remediation grant submitted by Antis Township and the township solicited requests for proposals. Earthmovers bid on the project. The Department informed Antis Township that it would not approve Earthmovers as a subcontractor based on alleged outstanding violations of the Solid Waste Management Act. Antis Township

ultimately rejected Earthmover's bid and awarded the contract to another company. The tires on the site have since been removed.

Earthmovers appealed, challenging the Department's determination that it was not eligible to enter into a contract with Antis Township to perform the waste tire remediation project based on alleged violations of the Solid Waste Management Act.

The procedural history of this case is as follows: On June 5, 2003, the Department filed a motion to dismiss, to which Earthmovers responded on July 7, 2003. The motion was denied in an opinion and order issued on July 31, 2003. *Earthmovers Unlimited, Inc. v. DEP*, EHB Docket No. 2003-108-R (Opinion and Order on Motion to Dismiss issued July 31, 2003). On August 8, 2003, the Department moved for reconsideration. The motion was denied in an opinion and order issued on August 27, 2003. *Earthmovers Unlimited, Inc. v. DEP*, EHB Docket No. 2003-108-R (Opinion and Order on Petition for Reconsideration issued August 27, 2003).

On February 4, 2004, the Department filed a motion for summary judgment. Earthmovers filed no response.

When ruling on motions for summary judgment, the Board looks to Pa. R.C.P. Nos. 1035.1-1035.5. *Hamilton Brothers Coal, Inc. v. DEP*, 2000 EHB 1262, 1263. With respect to responses to the motions, Pa. R.C.P. No. 1035.3 states that "the adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response," and that "summary judgment may be entered against a party who does not respond." Pa. R.C.P. No. 1035.3(a) and (d). Thus, the Board may dismiss an appeal where an appellant fails to file a response to a motion for summary judgment. *Hamilton,* 2000 EHB at 1263. *See also Concerned Carroll Citizens v. DEP*, 1999 EHB 167 (Summary judgment entered against Appellant for failure to respond to motions to dismiss treated as motions for summary judgment.)

Earthmover's response was due on March 5, 2004. Based on its failure to respond, we will enter summary judgment against it.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EARTHMOVERS UNLIMITED, INC.	:	
	:	
v.	:	**EHB Docket No. 2003-108-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 30th day of March, 2004, summary judgment is entered against Earthmovers Unlimited, Inc. and this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Member

Thomas W. Renwand

THOMAS W. RENWAND
Administrative Law Judge
Member

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

Chief Judge Michael L. Krancer and Judge Bernard A. Labuskes, Jr. are recused in this matter.

DATE: March 30, 2004

c: **DEP Bureau of Litigation:**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
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Southcentral Region

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JOSEPH J. BRUNNER, INC.	:	
	:	
v.	:	**EHB Docket No. 2002-304-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BEAVER VALLEY ALLOY FOUNDRY COMPANY, Intervenor	:	**Issued: April 6, 2004**

OPINION AND ORDER ON MOTION TO COMPEL DEPOSITION RESPONSES

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis:

The Board finds that responses given at the depositions of Departmental officials are not protected from disclosure pursuant to the deliberative process privilege.

OPINION

Joseph J. Brunner, Inc. ("Brunner") is prosecuting this appeal from the Department of Environmental Protection's (the "Department's") determination that Brunner must pay a $4.00 fee pursuant to Section 6301 of Act 90 of 2002, 27 Pa.C.S.A. § 6301 ("Act 90"), for each ton of certain material used as alternate daily cover at Brunner's landfill. Brunner disagrees with the Department's determination that the Act 90 fee applies to the material in question.

In response to an earlier discovery dispute in this appeal, we held that the Department may assert the deliberative process privilege in proceedings before the Board. *Brunner v. DEP*, EHB Docket No. 2002-304-L, (Opinion and Order, January 8, 2004) ("*Brunner I*"). The

Department has now asserted the privilege as the basis for objecting to questions posed at Brunner's depositions of William Pounds and Stephen Socash, two Departmental employees in the solid waste program. Brunner filed a motion to compel responses, which the Department has opposed.

As we began our evaluation of the problem, we quickly found that additional refinement of the specific questions being asked and objected to would aid us in determining whether the privilege should be applied. Accordingly, we issued an Order on February 6, 2004 entitling Brunner to depose Messrs. Pounds and Socash by written interrogatories relating to the subject matter that precipitated the Department's objections.

Brunner served notices of deposition upon written interrogatories to Messrs. Pounds and Socash in accordance with our Order. Following a conference call among the Board and counsel to clarify the procedures set forth in our Order, it was agreed that the Department would submit written objections to the deposition questions in advance of the actual depositions. After reviewing the Department's objections, and following another conference call with the parties, we decided that we would be in a better position to resolve the privilege question if we heard the answers to the deposition questions at issue. On March 4, 2004, we issued an Order advising the parties that we would conduct the depositions of Messrs. Pounds and Socash *in camera*. We would then decide which, if any, parts of the transcripts would be released in response to Brunner's motion to compel. The parties indicated during the conference call that this procedural approach was acceptable to them.

We conducted the depositions utilizing Brunner's written deposition questions on March 17, 2004. We used the Board's court reporter. We have now had an opportunity to review the transcripts from the depositions. As a preliminary matter, we should note that it became clear at

Socash's deposition that disclosing the response to Interrogatory 7 would have required Socash to reveal discussions covered by the attorney-client privilege. The transcript reflects our ruling on that question at the deposition itself. With regard to the deliberative process privilege, we conclude that the deposition responses will not be protected from disclosure pursuant to the privilege.

Application of the Deliberative Process Privilege

The Department in response to Brunner's motion to compel argues that Brunner has not shown a "credible need" to hear what Pounds and Socash have to say. As this appeal illustrates, evaluating a claim of deliberative process privilege can turn into an involved, time-consuming detour in the litigation. Therefore, in *Brunner I*, we noted that the party seeking the information must show a "credible need" before we will engage in this exercise. *Brunner I*, slip op. at 4. We do not wish to make too much of the requirement to show a credible need, particularly when the dispute arises in the context of discovery. A thorough comparison of probative value versus the sensitivity of the information is conducted later in the analytical process. By requiring a threshold showing of "credible need," our intent is simply to ensure that the parties and the Board are not sidetracked based upon frivolous or ill-founded efforts to harass or to extract unnecessary tattle. We have no sense that Brunner is so engaged.

Brunner I sets up a two-part analysis. First, we must determine whether the communications at issue satisfy the prerequisites for application of the deliberative process privilege. That essentially involves an analysis of whether the communications were (1) confidential (2) deliberations of (3) law or policy. If the prerequisites are met, we are left to assess whether the appellant's interest in disclosure outweighs the Department's interest in shielding the communications from disclosure. If the appellant's interest outweighs the

Department's interest, the communications will not be protected pursuant to the deliberative process privilege.

Some of the Messrs. Pounds and Socash's discussions have all the earmarks of confidential deliberations of policymaking. The following passages in the transcripts have drawn our greatest attention: Pounds--page 15, lines 7-14, page 18, lines 18-21; Socash--page 7, lines 17-23, page 8, lines 6-14 and 18-23. Only a couple of relatively highly placed employees and Departmental counsel appear to have participated.[1] The employees are in policymaking positions and were acting in that capacity. The officials were debating the meaning of a new statute with state-wide implications. The discussions did not relate to any one site or a unique set of facts. The employees had in mind providing a proposed, official Departmental interpretation to the Secretary's office. (Pounds p. 15 line 1-5.) In short, the deliberations in question are within the potential scope of the deliberative process privilege.

That leaves us to balance Brunner's interest in disclosure of the content of the deliberations against the Department's interest in keeping the deliberations confidential. We will take these in reverse order because the Department's interest is relatively straightforward. The Department's interest is that individuals such as Pounds and Socash should be able to freely exchange thoughts and ideas regarding the state-wide implementation of new statutes without undue fear that the discussions will become a matter of public record. Although it does not appear to us that the discussions at issue here were particularly sensitive or revealing, we nevertheless agree with the Department that the purpose of the privilege would be served by protecting the discussions from disclosure.

---

[1] At least some of the discussions might have been protected by the attorney-client privilege. It is not clear from the deposition responses, however, that Department counsel was present at all of the discussions.

We disagree with the Department's contention, however, that the contents of the discussions have no probative value in Brunner's appeal. This case will turn on the meaning of a statute. Our one and only function in such a case is to divine the Legislature's intent. 1 Pa.C.S.A. § 1921(a). It may be that the Legislature's intent is so abundantly clear from the face of Act 90 that we need go no further. *Eagle Environmental v. DEP*, 833 A.2d 805, 808 (Pa. Cmwlth. 2003) (where a statute is clear, there is no need to engage in interpretation). *See, e.g., RAG Cumberland Resources v. DEP,* EHB Docket No. 2003-067-L (Opinion and Order January 27, 2004) (mining statute unambiguously requires preshift examinations).

On the other hand, although we have not even begun to consider the question here, it may be that Act 90 may have some ambiguity. In that event, we will be tossed into the heady maelstrom of statutory interpretation. If we find ourselves afloat in such rough waters, one of the factors that we will need to consider is the Department's institutional interpretation. 1 Pa.C.S.A. § 1921(c)(8). In other words, that interpretation, once proven, is *evidence.* What counsel discourses in a brief is argument; what the Department as a whole has adopted as its official position is probative evidence of what an ambiguous statute actually means.[2]

Once we acknowledge that the Departmental interpretation is itself evidence, it follows that Brunner has an interest in its disclosure. And as with any other evidence that has the

---

[2] It is not necessary for us to decide exactly how probative the Department's position is at this point. The Department suggests that this Board will ultimately be required to simply defer to whatever the Department says the statute means. We are not sure that this Board has any obligation to *defer* to the Department's interpretation of a statute that we have determined to be ambiguous. The Commonwealth Court has only dealt with that question recently in an unpublished opinion that may not be cited. Even if we were required to give some deference, however, such deference has been held to be due in other contexts only *after* we find that the Department's interpretation is reasonable. *DEP v. NARCO*, 791 A.2d 461, 466-67 (Pa. Cmwlth. 2002) ("The EHB erred in refusing to defer to the Department's interpretation [of a regulation] *once the EHB concluded that the Department's interpretation of the regulation was reasonable* (emphasis added).") If we are not required to defer to unreasonable interpretations of regulations, it is not likely that we need to defer to unreasonable interpretations of statutes. But putting that aside, it would seem that the more weight the Department's position is entitled to, the greater its probative value.

potential to become part of the record, Brunner is not compelled to accept the evidence at face value, particularly at the discovery stage. Brunner is not required to say, "Well, this is what the Department says, so it must be true." Rather, Brunner is generally entitled to explore all pertinent aspects of the evidence. It is also entitled to discover information that may be used for impeachment purposes. Background information regarding the formulation and basis of the Department's programmatic choices on how it plans to implement an assertedly ambiguous statute might at least conceivably have an impact on the weight that this Board gives to the interpretation. We are not able to conclude as much now, but we are also not willing to categorically rule out such possibilities at this juncture of the case. Furthermore, determining whether the Department's interpretation is reasonable, if we are required to get into that, might very well involve consideration of precisely the sort of matters that Brunner is asking about. In short, Brunner is clearly in a legitimate search for potentially probative information.

Thus, Pounds and Socash's discussions are of the kind that are contemplated by the privilege, but the information is also of the sort that is generally probative. We have struggled with our balancing analysis because, perhaps ironically given all of the attention this one discovery issue is receiving, the communications at issue are rather innocuous. In that sense, disclosure is not particularly destined to chill future internal debate, but neither do we see disclosure as likely to have dramatic value in Brunner's case. On balance, we conclude that the evidence's potential probative value outweighs the Commonwealth's need to shield it from disclosure. Among the other factors that we have considered as discussed above, we are concerned that redacting the information would cast a pale over the proceedings by giving the inaccurate but understandable impression that important information existed but was being covered up. As always, we strive for the most informed adjudication possible founded upon a

complete record. The largely theoretical societal interest that might be marginally served by limiting Brunner's discovery of the discussions at issue is insufficient to compel us to deviate from that primary goal in this appeal.

Our order follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOSEPH J. BRUNNER, INC.	:	
	:	
v.	:	**EHB Docket No. 2002-304-L**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and BEAVER VALLEY	:	
ALLOY FOUNDRY COMPANY, Intervenor	:	

ORDER

AND NOW, this 6th day of April, 2004, Brunner's Motion to Compel Deposition Responses is granted. The parties may obtain a transcript of the depositions from the Board's reporting service.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: April 6, 2004

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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Southwest Regional Counsel

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

EXETER CITIZENS' ACTION COMMITTEE, INC.	:	
v.	:	**EHB Docket No. 2002-156-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and FR&S, INC. and PIONEER CROSSING LANDFILL	:	**Issued: April 6, 2004**

OPINION AND ORDER ON MOTION TO CONSOLIDATE

By George J. Miller, Administrative Law Judge

Synopsis

The Board denies a motion to consolidate proceedings in an appeal of a citizens group from the issuance of a landfill expansion permit with the appeal of the hosting county. A hearing on the merits has already been held in the citizens appeal and they have put forth no evidence which would support the reopening of the record and the consolidation with the host county's appeal, which is scheduled for hearing next month.

OPINION

The Exeter Citizens' Action Committee (Appellant) has filed a motion to consolidate its appeal with the appeal of Berks County from a landfill expansion permit issued to FR&S, Inc. (Permittee) in connection with the Pioneer Crossing Landfill.

Although the County does not object to the consolidation, both the Department and the Permittee strenuously opposed the motion because the hearing in the Appellant's appeal was held several months ago and the motion fails to aver adequate facts to support the reopening of the record. We agree that there is no basis to reopen the record, and to consolidate these appeals at this juncture would significantly prejudice the Permittee and the Department.

The relevant facts are as follows. Both the Appellant and the County filed timely appeals from the expansion permit issued to the Permittee on May 30, 2002. At no time did any party seek to consolidate the two appeals, and they each proceeded on separate pre-trial schedules. The Appellant's appeal, docketed at 2002-156-MG, proceeded to hearing on December 9-12, 2003. The Appellant called several witnesses, adduced exhibits, and cross-examined the witnesses of the Permittee. Post-hearing briefs were due in that appeal on February 16, 2004. However, on February 5, 2004, the Appellant's counsel sought permission to withdraw his appearance as he had been discharged by the Appellant. Shortly thereafter the Appellant sought a stay of proceedings in order for it to retain new counsel, which it did on March 11, 2004. The hearing of the Berks County appeal is currently scheduled to begin on May 19, 2004. The Appellant seeks to consolidate its appeal with that of the County in order to adduce additional evidence that it contends its prior counsel negligently failed to include in the record during the December hearing.

Before we can consolidate the Appellant's appeal with the County appeal, we must first determine whether it is proper to reopen the record. The Board's rules only

permit the reopening of the record, after the close of hearing but prior to adjudication under limited circumstances:[1]

> The record my be reopened upon the basis of *recently discovered* evidence when *all* of the following circumstances are present:
>
> (1) Evidence has been discovered which would conclusively establish a material fact of the case or would contradict a material fact which had been assumed or stipulated by the parties to be true.
>
> (2) The evidence was discovered after the close of the record and could not have been discovered earlier with the exercise of due diligence.
>
> (3) The evidence is not cumulative.[2]

The Appellant does not describe any evidence that has been "newly discovered." Rather, it evidently wishes to submit evidence that its prior counsel perhaps had in his possession but for unspecified reasons chose not to introduce at the hearing. Our rules do not allow the reopening of the record to permit a party to remediate a perceived error in trial strategy. To do so would do nothing more than allow the Appellant two bites at the proverbial apple, which necessarily prejudices the other parties in this matter.

Since we can not reopen the record, it necessarily follows that we can not permit the consolidation. Even if we could, we would not grant the Appellant's motion. Although there may be some common questions of law and fact between the two appeals, it would unduly prejudice the other parties to consolidate these matters at this late date, on the eve of hearing. The Department and the Permittee have already expended a great

---

[1] Because of our disposition of this matter, we will overlook the fact that the Appellant failed to file a proper petition to reopen the record. We could deny the motion to consolidate on that basis alone. 25 Pa. Code § 1021.133 (d).

[2] 25 Pa. Code § 1021.133(b).

deal of time and effort in conducting a hearing to meet the objections raised by the Appellant in its notice of appeal. Moreover, the Appellant's participation in the County's appeal is likely to make that proceeding more complex, and save little in the expenditure of judicial resources. That the Appellant may not believe that its prior counsel made sound professional judgments in his conduct of the December hearing is not relevant to the Board's consideration of whether it makes sense to consolidate these appeals.

Accordingly, the Appellant's motion is denied and we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

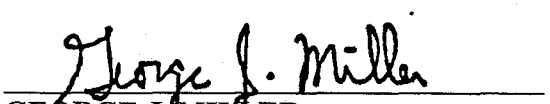
EXETER CITIZENS' ACTION COMMITTEE, INC.	:	
	:	
v.	:	**EHB Docket No. 2002-156-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and FR&S, INC. and PIONEER CROSSING LANDFILL	:	

ORDER

AND NOW, this 6th day of April, 2004, upon consideration of the motion of Exeter Citizens' Action Committee to consolidate the above captioned appeal with the appeal of the County of Berks docketed at 2002-155-MG, the motion is DENIED and it is further ORDERED as follows:

1. Appellant shall file its requests for findings of fact, conclusions of law and supporting legal memorandum on or before **May 3, 2004**.
2. The Department and the Permittee shall file their requests for findings of fact, conclusions of law and supporting legal memoranda on or before **June 1, 2004**.
3. Any response the Appellant may choose to file shall be filed on or before **June 18, 2004**.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Member

DATED: April 6, 2004

c: **DEP, Bureau of Litigation**
Attention: Brenda Houck, Library

Via Fax and Regular Mail to:

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SECHAN LIMESTONE INDUSTRIES, INC.	:	
	:	
v.	:	**EHB Docket No. 2003-222-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CITIZENS FOR PENNSYLVANIA'S FUTURE, FRIENDS OF MCCONNELL'S MILL STATE PARK, INC., LAWRENCE COUNTY, Intervenors	:	**Issued: April 6, 2004**

OPINION AND ORDER ON JOINT MOTION TO STAY

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

A joint motion for stay is granted where the same issue as that raised in this appeal is currently pending before the Pennsylvania Supreme Court. Staying this matter serves to conserve judicial resources and ensures consistent decisions as to common issues.

OPINION

This appeal involves the denial of an application for the construction and operation of a residual waste landfill filed by Sechan Limestone Industries, Inc. (Sechan) with the Department of Environmental Protection (Department). Intervening on the side of the Department are the following groups: Citizens for Pennsylvania's Future (Penn Future), Friends of McConnell's Mill State Park, Inc. (Friends) and Lawrence County.

The Department denied the application on the basis that Sechan did not meet the requirements of 25 Pa. Code § 287.127(c) by demonstrating that the benefits of the project to the public clearly outweigh the known and potential environmental harms (known as the "harms/benefits test"). Sechan appealed the denial of its application on August 27, 2003. One of its grounds for appeal is the harms/benefits test is contrary to law.

A similar argument was made in appeals previously before the Board: *Eagle Environmental L.P. v. Department of Environmental Protection,* 2002 EHB 335, *aff'd*, 818 A.2d 574 (Pa. Cmwlth. 2003) and *Tri-County Industries, Inc. v. Department of Environmental Protection*, EHB Docket No. 2001-252-R, Order issued April 11, 2002, *aff'd*, 818 A.2d 574 (Pa. Cmwlth. 2003). Therein, the Board upheld the harms/benefits test. These cases are currently on appeal before the Pennsylvania Supreme Court at *Eagle Environmental L.P. v. Department of Environmental Protection*, Docket No. 261 MAP 2003, and *Tri-County Industries, Inc. v. Department of Environmental Protection*, Docket No. 263 MAP 2003.

The Department and Sechan have filed a joint motion to stay proceedings in this matter until the harms/benefits question is decided by the Pennsylvania Supreme Court or for one year, whichever is earlier.[1] The Department and Sechan argue that waiting until the Supreme Court has decided the harms/benefits question would conserve judicial resources, avoid possibly inconsistent decisions and avoid the need for further appeal of those issues. Penn Future, Friends and Lawrence County oppose the motion to stay proceedings. They contend that any delay in the proceedings will harm them. They contend that a delay will hamper their ability to pursue discovery of facts relevant to this case because there is no guarantee that persons who participated in the decision-making process for the permit or witnesses for the intervenors will be available

[1] Although the Department and Sechan have asked for a stay for one year in the alternative, it would be more appropriate to issue a stay until such time as the Supreme Court rules on the other

one year from now or that their memories will remain fresh. They further assert that they would have to incur additional expense to have their experts re-familiarize themselves with the facts of the case one year from now. They further contend that there are other issues raised in this appeal that will not be impacted by any decision of the Pennsylvania Supreme Court in the aforementioned cases.

Relevant factors to be considered in deciding whether to grant a stay are the appellants' interests and potential prejudice, the burden on the appellee agency or other parties, the burden on the Board, and the public interest. *Ziviello v. DEP*, 1998 EHB 1138, 1139 (citing *Valley Forge Chapter of Trout Unlimited v. DEP*, 1997 EHB 925). Also to be considered are "the time and effort of counsel and litigants with a view toward avoiding piecemeal litigation." *Id.*

While the concerns raised by Penn Future, Friends and Lawrence County are certainly valid, they do not outweigh the need for judicial economy and ensuring that consistent decisions are reached on the question of the harms/benefits analysis. If the Supreme Court were to reverse the decisions in *Eagle Environmental* and *Tri County,* that would change the entire complexity of this case. And while we recognize that there are other issues involved in this appeal in addition to the harms/benefits question, nonetheless that is a major focus of this case and will be a deciding factor in ruling on Sechan's appeal. Were we to have a hearing and issue an adjudication on Sechan's appeal only to have the Supreme Court reach a different decision on the harms/benefits question, that would result in an enormous expenditure of time and resources not just for the Board but the parties as well. It is also likely to result in piecemeal litigation.

We further find that the intervenors will not be harmed by a stay of the proceedings. Since the matter on appeal is the Department's denial of Sechan's application for a residual waste

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pending matters.

landfill, the landfill will not be constructed at this time and the status quo will be maintained during the pendency of this stay.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SECHAN LIMESTONE INDUSTRIES, INC.	:	
	:	
v.	:	**EHB Docket No. 2003-222-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CITIZENS FOR PENNSYLVANIA'S FUTURE, FRIENDS OF MCCONNELL'S MILL STATE PARK and LAWRENCE COUNTY, Intervenors	:	

ORDER

AND NOW, this 6th day of April, 2004, this matter is stayed until such time as the Pennsylvania Supreme Court renders a decision in the cases of *Eagle Environmental L.P. v. Department of Environmental Protection*, Docket No. 261 MAP 2003, and *Tri-County Industries, Inc. v. Department of Environmental Protection*, Docket No. 263 MAP 2003.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administration Law Judge
Member

DATE: April 6, 2004

See service list on the following page

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SUNOCO, INC. (R & M)	:	
	:	
v.	:	**EHB Docket No. 2002-268-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 12, 2004**

ADJUDICATION

By: Michael L. Krancer, Chief Judge and Chairman

Synopsis:

The Board dismisses an appeal from a civil penalty in the amount of $3,465,660 assessed for Appellant's failure to install Reasonably Available Control Technology air pollution control equipment on a timely basis on two boilers at its facility. Appellant stipulated to committing the underlying statutory violations but challenged the methodology used to calculate the penalty and the reasonableness of the amount. The Board sustains the penalty as a lawful application of the Department's enforcement authority pursuant to the Air Pollution Control Act.

BACKGROUND

This is an appeal of a civil penalty assessment in the amount of $3,465,660 issued by the Department of Environmental Protection (DEP or Department) to Sunoco, Inc. (R&M) (Sunoco) on September 27, 2002 for violations of the Air Pollution Control Act (APCA).[1] Sunoco's violations involved its failure to comply with DEP regulations applicable to major sources of

[1] Act of January 8, 1960, P.L. 2119 (1959), as amended, 35 P.S. § 4001 *et seq.*

nitrogen oxide emitting compounds (NOx) subject to the Reasonably Available Control Technology (RACT) control program. Specifically, Sunoco failed to comply with a Plan Approval and a Compliance Permit, both issued on June 8, 1995, requiring the installation of particular RACT technology on two industrial boilers at Sunoco's oil refinery facility located in Marcus Hook Borough, Delaware County (the Facility). Sunoco admits liability but challenges the amount of the penalty.

Pennsylvania's RACT regulations grew out of amendments to the federal Clean Air Act, 42 U.S.C. § 7401 *et seq.* (CAA).[2] In 1990 Congress amended the CAA, in part, by requiring states to implement a program for reducing levels of ozone in areas which exceed the National Ambient Air Quality Standard for that pollutant. *See* 42 U.S.C. § 7511a. The RACT control program is a statutory program designed to reduce ozone. The goal of the RACT program is to reduce ground level ozone by controlling emissions of two ozone precursors, NOx and Volatile Organic Compounds (VOC). The 1990 CAA amendments compelled the States to develop a plan for requiring the use of RACT on certain categories of NOx and VOC sources located in nonattainment areas. 42 U.S.C. §§ 7511a(b)(2), 7511a(f)(1). States were required to submit their proposed RACT regulatory provisions to the Environmental Protection Agency (EPA) by November 1992, and to provide for implementation of the required measures by May 31, 1995. *See* 42 U.S.C. § 7511a(b)(2).

DEP published proposed regulations implementing the RACT program in August 1992. 22 Pa. Bull. 4285 (Aug. 15, 1992). After a lengthy public comment period, DEP ultimately promulgated the revised RACT regulations in January 1994. 24 Pa. Bull. 467 (Jan. 15, 1994). Pennsylvania's RACT program is focused on technology, rather than emission limits. The RACT

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[2] *See* 25 Pa. Code §§ 129.91 to 129.95.

determination is for the use of a specific control technology by the individual affected source.[3] The regulations implement the RACT requirements on a case-by-case basis, allowing the regulated facility to take into account source-specific factors and select the control approach for each source which would minimize the economic impact while meeting the air quality objectives. *Id.* at 468.

The RACT regulations require the operator of an affected facility to identify the sources to which the regulations applied, and to ascertain through emission testing the total potential to emit, and the actual emissions, of VOC and NOx for the 1990 calendar year for each source at the facility. That is, a baseline emission rate, both potential and actual, had to be established for each affected source. *See* 25 Pa. Code § 129.91(b). By July 15 1994, the operator of a major NOx or VOC facility was required to submit a written proposal to DEP designating the operator's preferred RACT for each affected source in the facility, based on a technical and economic analysis prescribed by the regulations. 25 Pa. Code § 129.91(d).[4]

The regulations expressly require that each RACT analysis and proposal contain proper supporting documentation. 25 Pa. Code § 129.92(a)(5). In addition, the proposal was to contain: a proposed schedule for implementing the RACT for each source, proposed testing procedures, and applications for a plan approval and an operating permit. 25 Pa. Code § 129.92(a). DEP

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[3] The regulations define "RACT—Reasonably Available Control Technology" to mean: "The lowest emission limit for VOCs and NOx that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility." 25 Pa. Code § 121.1.

[4] The RACT analysis was to include a ranking of the technically-feasible available control options in order of overall control effectiveness for NOx emissions. The cost-effectiveness of each option was then evaluated in terms of dollars per ton of NOx emissions reduced by the control option. Cost-effectiveness was calculated by taking the source's baseline emission rate and applying the estimated emission reduction potential or control efficiency (expressed as a percentage) for the specific control option to determine the annual quantity of NOx emissions reduced by the control option. The annualized cost of installing, operating and maintaining the control option was then divided by the estimated annual number of tons of NOx removed to ascertain the cost-effectiveness ratio. *See* 25 Pa. Code § 129.92(b). Thus, as a rough example, if a source's baseline emission rate is 200 tons of NOx per year, the projected control efficiency is 50% for option A (thus yielding a reduction of 100 tons of NOx a year), and the total annualized cost for option A is $100,000/year; then the average cost-effectiveness for option A would be $100,000 divided by 100 tons, equaling a cost of $1,000/ton of NOx reduced by control option A.

would review each RACT proposal and either approve, deny or modify the RACT selected for each source by the operator. 25 Pa. Code § 129.91(e). Once the facility received DEP's determination of the appropriate RACT for each affected source, the operator was required to implement that control measure as expeditiously as practicable, but no later than May 31, 1995, in order to meet the statutory deadline for implementing the RACT control program established by the 1990 CAA amendments. 25 Pa. Code § 129.91(f); 42 U.S.C. § 7511a(b)(2).

Sunoco operates two industrial boilers which are NOx sources at the Facility—Boilers No. 6 and No. 7. Boilers Nos. 6 and 7 are the focus of the civil penalty assessment. In June 1995, DEP issued a NOx RACT determination for Boilers No. 6 and 7 which DEP memorialized in the June 8, 1995 Plan Approval and Compliance Permit. The 1995 Plan Approval and the 1995 Compliance Permit required the installation of six ultra-low NOx burners with internal flue gas recirculation (ULNB) on Boiler No. 6 and the installation of four ULNB on Boiler No. 7 as RACT for those two boilers. The Plan Approval and the Compliance Permit included a schedule requiring Sunoco to install the ULNB by May 31, 1996 as well as various milestones to be met along the way.

Sunoco did *not* appeal the 1995 Plan Approval or the 1995 Compliance Permit. Very importantly also, Sunoco did not comply with the 1995 Plan Approval and the 1995 Compliance Permit. Rather, Sunoco operated Boiler No. 6 from June 1995 through September 2001, and Boiler No. 7 from June 1995 to mid-October 1998, without implementing the NOx RACT determinations made in the 1995 Plan Approval and Compliance Permit for those two sources. This failure to install RACT for Boilers No. 6 and 7 constituted violations of the APCA for which DEP assessed the civil penalty which forms the subject of this appeal. Sunoco has stipulated that its liability for the APCA violations underlying the penalty assessment is not at

issue. *See* Joint Stipulation, at ¶¶ 1-2. Instead, Sunoco objects to the methodology employed by DEP to calculate the penalty, contends that the penalty is unreasonable, arbitrary and unlawful, and asks the Board to substantially reduce the penalty amount.

Chief Judge Michael L. Krancer presided over a six-day trial conducted from June 17-27, 2003. The record consists of: a joint stipulation which incorporates the findings in a stipulation of settlement resolving three related Board appeals, an 1,164-page hearing transcript, and 61 exhibits. After careful review, the Board makes the following findings of fact.

FINDINGS OF FACT

Background

1. DEP is the agency with the duty and authority to administer and enforce the Air Pollution Control Act, Section 1917-A of the Administrative Code of 1929, and the regulations implementing such statutes. (Stipulation of Settlement (Stip.), at ¶ 1).[5]

2. Sunoco is a Pennsylvania corporation with a business address of Ten Penn Center, 1801 Market Street, Philadelphia, PA 19103. Sunoco owns and operates an oil refinery facility located in Marcus Hook Borough, Delaware County (the Facility). (Stip. ¶¶ 2-3).

3. The Facility is located within the five-county portion of the Philadelphia Consolidated Metropolitan Statistical Area, which area has been classified as a severe ozone nonattainment area. (Stip. ¶ 3; Hearing Transcript (Tr.) at pages 184-85; 22 Pa. Bull. 4285).[6]

4. The Facility is a major NOx emitting facility and thus is subject to the RACT

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[5] Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 510-17.

[6] The CAA requires the EPA to establish health-based National Ambient Air Quality Standards (NAAQS) for certain specified air pollutants, including ground-level ozone. Geographic areas of the nation are classified with respect to the degree to which the area has attained the NAAQS for each pollutant. Thus, an area can be classified as "attainment" if it has met the NAAQS, as "marginal" if it is only slightly below meeting the standard, or as "moderate" *non*attainment, "serious" nonattainment, "severe" or "extreme" depending on the degree to which the area has not met the standard. More stringent and far-reaching pollution controls must be implemented in those areas furthest from attaining the NAAQS in order to bring these areas into attainment status. (Tr. 182-88; 42 U.S.C. §§ 7407, 7408, 7409, 7511a).

control program. As part of its refinery process at the Facility, Sunoco operates two boilers, Boiler No. 6 and Boiler No. 7. Each of these boilers is considered an "air contamination source" as defined in Section 3 of the APCA, 35 P.S. § 4003. These boilers are also considered major sources of NOx and are thereby subject to the Pennsylvania RACT regulatory requirements found in 25 Pa. Code §§ 129.91 to 129.95. (Stip. at ¶¶ 4-5; Exhibit A-3).[7]

Key Personnel and Witnesses

5. Gary Rabik is currently employed by Sunoco as a corporate air environmental resource; he was employed as the Environmental Manager for the Facility from 1990 through January 2001. Mr. Rabik has an M.S. in Water Resource Management and Environmental Engineering, is a Registered Professional Engineer, and has been employed as an engineer and environmental engineer at petroleum refineries since 1980. (Tr. 549-62).

6. As the Environmental Manager at the Facility from 1990 to 2001, Mr. Rabik had overall responsibility for assuring that the Facility complied with all air pollution control laws. In that capacity, Mr. Rabik had ultimate responsibility for all submissions made to DEP in connection with the RACT control program. (Tr. 560-62).

7. Heather Chelpaty was employed by Sunoco as an Environmental Specialist Associate at the Facility from 1991 through March 1997. During that period, Ms. Chelpaty was

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[7] The regulations define a "Major NOx emitting facility" as:

> A facility which emits or has the potential to emit NOx from the processes located at the site or on contiguous properties under the common control of the same person at a rate greater than one of the following:
>
> (i) Ten tons per year in an ozone nonattainment area designated as extreme under section 182(d) of the Clean Air Act (42 U.S.C.A. § 7511a(e) and (f)).
>
> (ii) Twenty-five tons per year in an ozone nonattainment area designated as severe under section 182(d) and (f) of the Clean Air Act.
>
> (iii) Fifty tons per year in an ozone nonattainment area designated as serious under section 182(c) and (f) of the Clean Air Act.
>
> (iv) One hundred tons per year in an area included in an ozone transport region established under section 184 of the Clean Air Act (42 U.S.C.A. § 7511c).

25 Pa. Code § 121.1.

the Facility's main air pollution control engineer, and she was responsible for assuring the Facility's compliance with the air pollution control laws. (Tr. 561, 648; Exhs. A-3, A-4).

8. Stephen Martini is employed by Sunoco as the Environmental Supervisor for the Facility. Mr. Martini has held various environmental engineering positions since 1969, including positions with Sunoco as an air compliance engineer and environmental manager. In those positions, he had responsibility for assuring Sunoco's compliance with all environmental laws. In the summer of 1999, Mr. Martini became involved in Sunoco's efforts to comply with the RACT regulations with respect to Boilers 6 and 7 at the Facility. (Tr. 840-55).

9. George Monasky is employed by DEP as an Air Pollution Control Engineer III in DEP's Southeast Regional Office. Mr. Monasky has an M.S. in Chemical Engineering and a professional engineer's license in environmental engineering; he was first employed by DEP in 1993 as an Air Pollution Control Engineer I and has been promoted twice since that time. His responsibilities include reviewing plan approval and permit applications, reviewing and implementing RACT proposals, and drafting plan approvals and operating permits for implementing air quality control programs. (Tr. 16-19).

10. Francine Carlini is employed by DEP as Regional Air Quality Program Manager for the Southeast Regional Office. Ms. Carlini has been employed by DEP since 1975; she started as an Air Quality Specialist conducting facility inspections, was promoted to Air Quality District Supervisor, and to Air Quality Operations Chief where she was responsible for all inspection enforcement activities in the Southeast Region. In 1995, she attained her current position where she is responsible for overseeing the air quality program in the Southeast Region including all permitting, inspection and enforcement activities. She has overall responsibility for all permitting and enforcement actions with respect to the Facility. (Tr. 178-82).

Sunoco and RACT—The Beginning

11. Sunoco was aware in November 1990, upon passage of the CAA amendments, that a RACT regulatory requirement would be forthcoming in the next few years. Mr. Rabik and Ms. Chelpaty began monitoring the Pennsylvania RACT regulatory process beginning in the early 1990s. (Tr. 562-63, 729-33).

12. In September 1993, Ms. Chelpaty submitted an engineering request and job assignment for the 1994-95 budget year at the Facility which was approved by Mr. Rabik. The engineering request stated that RACT was legally required to be implemented, by May 31, 1995, on all affected NOx sources in Sunoco's facilities located in Pennsylvania. The purpose of the engineering request was to secure a place holder in Sunoco capital budgets for the cost of complying with the RACT regulatory requirements. (Tr. 734-36, 739; Exh. C-2).

13. In December 1993, Ms. Chelpaty similarly submitted an engineering request and job assignment for the 1993-94 budget year at the Facility, also approved by Mr. Rabik. The request was for installation of sample ports on the stacks of all heaters and boilers in Sunoco's Pennsylvania and Delaware facilities, which equipment was necessary to compile the legally required NOx baseline emission inventory. (Tr. 734-36, 739; Exh. C-3).

14. Although there was no substantial change to the case-by-case approach adopted by the RACT regulations between their initial publication in 1992 and final promulgation in 1994, Sunoco did not commence baseline emission testing or the RACT analysis for sources at the Facility until after promulgation of the final RACT regulations in January 1994. At that time, Sunoco also hired two consultants—an environmental and an engineering firm—to actually prepare the RACT proposal for the Facility. (Tr. 322-32, 563-68, 568-69).

The Initial RACT Proposals and the 1995 Plan Approval and Compliance Permit

15. Sunoco's environmental consultant submitted the Facility's initial RACT proposal

to Sunoco; Ms. Chelpaty then submitted the proposal to DEP in July 1994. Mr. Rabik did not review the written proposal, but received an oral summary of the document. Sunoco's RACT proposals were given high priority by DEP, and Mr. Monasky reviewed the original proposal shortly after it was received in July 1994. (Exh. A-3, Tr. 22-23, 188-89, 571-73).

16. The original RACT proposal for the Facility—the July 1994 RACT Proposal—listed eight potential control options, including ULNB and Low NOx Burners (LNB), in the RACT analysis for Boilers 6 and 7. Of these eight, Sunoco proposed to employ combustion tuning as its preferred NOx RACT for both Boiler No. 6 and Boiler No. 7. Combustion tuning involves only the making of adjustments and minor upgrades to the current combustion system. Relatively low reductions in NOx emissions are achieved (approximately a 25% reduction of NOx); with respect to actual reduction of NOx emissions, combustion tuning was the least effective of the potential RACT options for the two boilers. No new equipment would be installed, thus no capital cost expenditure is required; according to Sunoco's RACT analysis, the only cost associated for combustion tuning was an annual maintenance cost of $7,000. (Exh. A-3 at pp. 3-3 to 3-4, 4-1 to 4-3, 3-26 to 3-27, and Tables 3-11, 3-12 and 4-1).

17. In the July 1994 RACT Proposal Sunoco indicated that the control efficiency of the ULNB for Boiler No. 6 was a 75% reduction of NOx emissions when the boiler was burning fuel gas and a 14% NOx emission reduction when burning fuel oil. Similarly, for Boiler No. 7, which burned only fuel gas, the RACT analysis estimated a 75% control efficiency for ULNB. Mr. Monasky considered these estimated ULNB reduction efficiencies to be reasonable. (Exh. A-3, at pp. 3-26 to 3-27 and Tables 3-11 and 3-12; Tr. 23).

18. In the July 1994 RACT Proposal, Sunoco stated that its total capital cost for installing ULNB on Boiler No. 6 would be $1,550,554; the same cost was indicated for installing

ULNB on Boiler No. 7. (Exh. A-3, at pp. 3-26 to 3-27 and Tables 3-11 and 3-12; Tr. 23).

19. The total capital cost, along with annual operation and maintenance costs, were averaged over ten years—the standard estimated life used for control equipment options when performing the RACT analysis—to obtain a total annual cost for each control option. This figure was used to calculate the cost effectiveness ratio (in $ per ton of NOx removed) for each control option. In its July 1994 RACT Proposal, Sunoco indicated that the cost effectiveness ratio for ULNB on Boiler No. 6 was $1,637/ton. For ULNB on Boiler No. 7, the cost effectiveness ratio was calculated as $1,516/ton. (Exh. A-3 at 3-26 to 3-27 and Tables 3-11, 3-12; Tr. 22-23).

20. The regulations define "RACT" as: "The lowest emission limit for VOCs and NOx that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility." In making its determination of the appropriate RACT to be implemented for each affected NOx source, DEP selected the control option that obtained the greatest reduction of NOx emissions while not significantly exceeding a cost effectiveness ratio of $1,500/ton. The $1,500/ton figure was formally adopted by DEP as a guideline threshold. (25 Pa. Code § 121.1; Tr. 49, 182-84).

21. During the relevant period when Sunoco was submitting its series of RACT proposals to DEP, Sunoco was aware that DEP had adopted the $1,500/ton figure as the guideline threshold for the RACT cost effectiveness ratio. (Tr. 607, 615).

22. On its face, Sunoco's RACT analysis in the July 1994 RACT Proposal for Boiler No. 7 showed that ULNB were the appropriate RACT control option; (at $1,516/ton and 75% emission reduction, ULNB achieved the greatest emission reduction while not significantly exceeding the $1,500/ton cost effectiveness ratio). Moreover, the RACT analysis for both boilers contained an obvious error. For all control options, except combustion tuning, the baseline

emission rate was inexplicably reduced by 25 percent. The result of this artificial decrease in the baseline emission rate was a decrease in the quantity of emission reductions obtained from each control option (except combustion tuning) and a consequent increase in the cost effectiveness ratio. Correcting this error yields a cost effectiveness ratio for ULNB well below the $1,500/ton guideline adopted by DEP for making RACT determinations. Consequently, after conducting his review of the July 1994 RACT Proposal, Mr. Monasky determined that ULNB should be installed on Boilers No. 6 and No. 7 as the control option which appropriately implemented the RACT regulations. (Exh. A-3 at 3-26 to 3-27 and Tables 3-11, 3-12; Tr. 29-30).

23. In September 1994, Sunoco submitted to DEP a revised NOx RACT analysis for affected sources at the Facility, including Boilers 6 and 7. The September 1994 RACT Proposal corrected several errors contained in the July 1994 RACT Proposal. The artificial 25% reduction in the baseline emission rates for Boilers 6 and 7 was corrected; costs for shutting down the boilers, improperly included as part of the total annual costs, were excluded; additional factual detail for the RACT analyses was provided. In addition, Sunoco submitted applications for plan approval and operating permits as required by the regulations. (Exh. A-4; Tr. 24-26, 604-06).

24. The September 1994 RACT Proposal contained revised RACT analyses for Boilers 6 and 7. The total capital cost for ULNB was still shown as $1,550,554 for each of the two boilers; the ULNB control efficiencies on Boiler No. 6 were again indicated as 75% and 14% for fuel gas and fuel oil, and on Boiler No. 7 as 75% for fuel gas. But the baseline emission rate error had been corrected on the RACT analysis for Boiler No. 6. As a result, the cost effectiveness ratio for ULNB on Boiler No. 6 was $1,202/ton, well below the $1,500/ton guideline threshold. (Exh. A-4 at pp. 44250, 44263-64).

25. The RACT analysis for Boiler No. 7 corrected the artificial decrease error in the

emission rate; Sunoco also revised the baseline emission rate for the boiler upward from 346 to 486 tons/year. As a result of these emendations, the cost effectiveness ratio for ULNB on Boiler 7 resulted in $810/ton, well below the $1,500/ton threshold. (Exh. A-4 at p. 44264).

26. Nevertheless, the September 1994 RACT Proposal proposed to install LNB as Sunoco's choice for NOx RACT for both Boiler 6 and 7. The cost effectiveness ratio for LNB on Boiler No. 6 was $1,183/ton; for LNB on Boiler No. 7 it was $815/ton, (comparable to ULNB). But the total capital cost for installing LNB was indicated as $1,046,151 on Boiler No. 6, and as $1,178,457 on Boiler No. 7—(as opposed to approximately $1.5 million for ULNB). The control efficiencies for LNB were indicated as 50% and 14% for Boiler No. 6, and 50% for Boiler No. 7 (as opposed to 75% NOx reduction for ULNB). (Exh. A-4 at pp. 44263, 44264).

27. Mr. Monasky reviewed the September 1994 RACT Proposal, and he considered the control efficiencies indicated by Sunoco for ULNB and LNB as reasonable. Based on his review of the proposals submitted by Sunoco in July and September 1994, he determined that ULNB should be installed on Boilers 6 and 7 as the control option which appropriately implemented the RACT regulations. (Tr. 24-26, 29-30).

28. In January 1995, Sunoco submitted revised pages for its Plan Approval Applications for Boilers 6 and 7 which incorporated new estimated emission rates the two boilers. Sunoco continued to seek approval for installation of LNB on the two boilers as the RACT control option; but in its January 1995 submission Sunoco provided no new capital cost information for the feasible control options, no new control efficiency estimates, and no revised RACT analysis. Mr. Monasky reviewed the January 1995 submission and, based on his review of the RACT proposals, concluded that ULNB continued to be the appropriate control option on Boilers 6 and 7 for implementing the RACT regulatory requirements. (Exh. A-5; Tr. 28-30).

29. As of March 1995, Sunoco had allocated only $800,000 for implementing RACT program requirements at the Facility. There was never an issue concerning its financial ability to comply with RACT requirements for affected sources at the Facility. Yet Sunoco failed to allocate sufficient funds in its budget as of March 1995 even to obtain one set of the LNB for which Sunoco sought approval in its applications for Boilers 6 and 7. The failure to allocate an amount sufficient to install the required RACT control options on Boilers 6 and 7 was done even though Ms. Chelpaty had submitted engineering requests in late 1993 precisely for the purpose of obtaining a budget place holder for meeting RACT requirements. (Tr. 739-41, 749-51).

30. The leader of the engineering team assigned by Sunoco to address the RACT project at the Facility reported to Mr. Rabik that the low budget allocation would compel Sunoco to delay its installation of the required RACT control options for Boilers 6 and 7 into the 1996 calendar year, and would probably compel Sunoco to delay delivery of the required RACT equipment into the 1996 calendar year. (Tr. 739-41, 749-51).

31. Nevertheless, by letter dated April 27, 1995 Sunoco proposed to DEP a compliance schedule for implementing the selected RACT control option on Boilers 6 and 7. Sunoco proposed a schedule in which it would award a contractor bid, perform final engineering, take delivery of equipment, install the equipment, and complete startup, shakedown and performance testing by May 31, 1996—so long as DEP issued its Plan Approval to Sunoco by early June 1995. Sunoco's proposed compliance schedule conflicted with its assessment regarding the delay caused by the inadequate budget allocation. (Exh. C-41; Tr. 759-60).

32. Prior to June 1995, Sunoco received at least one working draft of the Plan Approval and Compliance Permit for implementing RACT on Boilers 6 and 7. Sunoco proposed specific, preliminary, emission limits for insertion into the plan approval. (Tr. 762-64).

33. DEP issued the final Plan Approval for the installation of NOx RACT on Boilers 6 and 7 on June 8, 1995. The Plan Approval required Sunoco to install six ULNB with internal flue gas recirculation on Boiler No. 6 and, similarly, four ULNB on Boiler No. 7. The 1995 Plan Approval, PA-23-0001, also required Sunoco to determine the NOx emission rate for the two boilers by the use of certified continuous emission monitors. (Exh. C-7; Tr. 30-33).

34. The 1995 Plan Approval included preliminary emission limits for each boiler which were excessively high, so that in the event the ULNB did not perform in the expected range of control efficiency, Sunoco would not find itself in a state of instantaneous noncompliance following installation of the RACT control equipment. DEP expressly reserved the right to establish more stringent emission limits based on test results from continuous emission monitors or stack tests. A condition in the Plan Approval established that final emission limits would be determined using at least six months of data from the continuous emission monitors for Boilers 6 and 7. (Exh. C-7, at ¶¶ 5 and 6; Tr. 35-37, 134-35, 164-65, 797-98).

35. On June 8, 1995, DEP also issued to Sunoco a Compliance Permit for the operation of all NOx emission sources at the Facility. The 1995 Compliance Permit specified RACT requirements for the Facility's NOx sources, including Boilers 6 and 7. (Exh. C-8; Tr. 40-41).

36. A "compliance" permit was required in order to establish a compliance schedule for implementing Sunoco's RACT requirements because the May 31, 1995 statutory deadline set by the CAA for implementation of RACT controls by the states had already passed. In the 1995 Plan Approval and the 1995 Compliance Permit, DEP adopted the compliance schedule for implementing the RACT requirements for Boilers 6 and 7 proposed by Sunoco in its April 1995 letter. The 1995 Plan Approval and the 1995 Compliance Permit required installation of the

ULNB by May 31, 1996. (Tr. 40-41; Stip. at ¶ 6; Exhs. C-7, C-8, C-41).

37. On or about June 9, 1995, Sunoco sent a copy of a one-page letter Sunoco had purportedly received from its engineering consultant, Fluor Daniel, regarding cost estimates and guaranteed emission control rates for LNB. Sunoco contended that this information had a significant impact on its RACT analysis. However, DEP had approved installation of ULNB on Boilers 6 and 7 as compliant with the RACT regulations, not LNB, which were the subject of the correspondence from Fluor Daniel. (Exh. A-10; Tr. 608-20).

Sunoco's Failure to Comply with the 1995 Plan Approval and Compliance Permit

38. Sunoco did not file an appeal of the 1995 Plan Approval nor the 1995 Compliance Permit to this Board. (Stip. at ¶ 7).

39. Sunoco continued to operate Boilers 6 and 7 but did not install the ULNB on the boilers as required by the 1995 Plan Approval and Compliance Permit. Nor did Sunoco install and have certified the continuous emission monitors or conduct the testing required by the 1995 Plan Approval and Compliance Permit. (Tr. 764-65).

40. Mr. Rabik testified that Sunoco did not comply with the 1995 Plan Approval and 1995 Compliance Permit because he believed they were "a living document" but he conceded that he understood that these were DEP final actions, not draft documents. (Tr. 643, 797-98).

41. We did not find credible Sunoco's explanation for its failure to comply with the legal obligations imposed by the unappealed 1995 Plan Approval and 1995 Compliance Permit, particularly given the experience of Mr. Rabik and other Sunoco personnel responsible for environmental compliance at the Facility. (F.F. # 41).

42. By submission dated July 12, 1995, Sunoco submitted a revision to its RACT analysis for Boiler No. 6. According to the submission, further engineering of the RACT project had found that the emission rate and cost estimates in the original analysis were "not

representative" for the installation of LNB, and that better data had become available which demonstrated that the cost effectiveness ratio for LNB significantly exceeded the $1,500/ton guideline threshold. The July 12, 1995 submission stated that it was withdrawing its Plan Approval application for ULNB. Of course, the 1995 Plan Approval and 1995 Compliance Permit requiring ULNB on Boiler No. 6 had already been issued. Sunoco's July 12, 1995 submission again proposed combustion tuning as its preferred choice for RACT on Boiler No. 6. (Exh. A-11; Tr. 41-45).

43. The RACT analysis in the July 1995 submission radically changed the control efficiency for ULNB on Boiler No. 6 to 36% for fuel gas and 1.2% for fuel oil (from 75% and 14% respectively)—without providing any supporting documentation for such change. These same control efficiencies (36% and 1.2%) were now ascribed to LNB as well. The total capital cost for LNB was increased to $1,181,700 (from $1,046,151), and the annual operating and maintenance cost was also increased for LNB. Bid documents for LNB were submitted as support for the cost estimates indicated. No supporting cost data was provided for ULNB, although the RACT analysis indicated the same exact cost for ULNB as for LNB, thus rendering an identical analysis for ULNB and LNB. (Exh. A-11, at p. 44459; Tr. 41-45).

44. Mr. Monasky reviewed the July 1995 submission. Based on his review of relevant technical information, he did not consider reasonable the lower control efficiencies provided by Sunoco for the ULNB. (Tr. 43-44).

45. Using the cost data provided by Sunoco in the July 1995 submission, in conjunction with a standard manual issued by EPA for estimating the total costs of different control technologies, Mr. Monasky performed a RACT analysis for the various control options feasible for Boiler No. 6. Based on his analysis, he concluded that ULNB continued to meet the

RACT regulatory criteria and should be installed as RACT on Boiler No. 6. (Tr. 46-48).

46. In contrast to its July 1995 submission, as of late April 1996—just one month prior to its deadline for installing ULNB on Boilers 6 and 7 pursuant to the 1995 Plan Approval and Compliance Permit—Sunoco performed several RACT analyses for Boiler No. 7 in which it determined that ULNB continued to meet the RACT regulatory criteria. Sunoco's April 1996 analyses employed the lower 36% control efficiency, and a total capital cost of between $800,000 and $900,000; the cost effectiveness ratios yielded were significantly lower than the $1,500/ton guideline threshold. (Exh. C-9; Tr. 771-74).

47. As of April/May 1996, Sunoco had no plan for, or intention of, complying with the 1995 Plan Approval and Compliance Permit by installing the ULNB as required. In early May 1996, Sunoco became aware for the first time of a control technology called SPUD burners. Mr. Rabik decided to proffer the SPUD burners technology to DEP as an alternative to the ULNB, and attempt to renegotiate the compliance schedule, even though he had received no communication from DEP which would indicate that Sunoco was not required to comply with the legal obligations imposed by the 1995 Plan Approval. (Exh. C-10; Tr. 775-76, 819-26).

48. In late May 1996, Sunoco changed its position from all prior proposals and submitted a revised NOx RACT analysis for Boiler No. 7 in which it proposed the installation of SPUD burners as the appropriate NOx RACT on Boiler No. 7. A plan approval application for installing SPUD burners was included, but no supporting technical or economic documentation was provided with the submission. (Exh. A-14, Exh. C-10; Tr. 48).

49. The May 1996 submission contained a minimal RACT analysis which compared only two control options: ULNB and SPUD burners. In this analysis, Sunoco estimates a 36% control efficiency for ULNB and a 23% control efficiency for SPUDs; the total capital cost

indicated for ULNB is $1,000,000 and for SPUDs is $200,000. The cost effectiveness ratio for ULNB is calculated as $1,128/ton, well below the $1,500 guideline threshold for RACT determinations. Given that the ULNB are substantially more control efficient and are below the $1,500/ton guideline, the analysis on its face demonstrates that ULNB, and not SPUDs, should be installed as the RACT control option for Boiler No. 7. (Exh. A-14; Tr. 48-49).

50. Mr. Monasky reviewed the May 1996 submission. He determined that Sunoco had not demonstrated that SPUDs would meet the RACT regulatory criteria, and concluded that ULNB continued to be the appropriate RACT for Boiler No. 7. (Tr. 49-50).

51. By submission dated August 7, 1996, Sunoco submitted another revised RACT analysis and proposal for Boiler No. 7, again without any supporting technical or economic documentation. Sunoco stated in the submission that it constituted a withdrawal of its prior Plan Approval application for Boiler No. 7. Once again, the 1995 Plan Approval and the 1995 Compliance Permit had already been issued by the date of the August 7, 1996 submission. In the August 1996 submission, Sunoco retained the same control efficiency and cost for ULNB, but reduced the control efficiency for SPUDs to 14% (compared to 23% two months earlier). Sunoco then made a key change to one of the underlying fundamental assumptions: equipment life expectancy is reduced from the standard term of 10 years to only 2.5 years. This yields a substantial change in the cost effectiveness ratio because the total cost of the control option is spread over only 2.5 years, as opposed to the standard 10-year period. The cost effectiveness ratios for ULNB and SPUDs in the August 1996 submission are $2,934/ton and $1,731/ton respectively. (Exh. A-15; Tr. 50-53).

52. In the August 1996 submission, Sunoco contends that no control option meets the RACT regulatory criteria, the company withdraws its recent plan approval application for SPUD

burners for Boiler No. 7, and it proposes combustion tuning as the preferred RACT option for Boiler No. 7. (Exh. A-15 at p. 48713).

53. The reason given by Sunoco for deviating from the standard RACT-analysis assumption of a 10-year economic life for control options was that Boiler No. 7 may be subject to additional regulatory requirements in the future. Mr. Monasky testified that Sunoco's assertion that it would have to remove either the SPUDs or the ULNB to meet future RACT regulations was incorrect; therefore, Sunoco's attempt to deviate from the standard 10-year economic life for control equipment was unjustified. (Exh. A-15, at pp. 48712-13; Tr. 51-52).

54. Sunoco's internal position in August 1996 was that the Facility should not plan on doing anything to attempt to comply with the RACT regulations for Boiler No. 7 during the remainder of 1996 and all of calendar year 1997, and that it may plan on complying during a scheduled plant shutdown in 1998. (Exh. C-11; Tr. 778-80).

55. In November 1996, the 1995 Plan Approval, PA-23-0001, expired according to its terms. Prior to its expiration, DEP did not extend or reissue the 1995 Plan Approval. (Stip. ¶ 10).

56. In May 1997, Mr. Monasky re-evaluated all of the data provided by Sunoco in its prior RACT submissions for Boilers 6 and 7 and prepared a memorandum summarizing the results of his analysis for Ms. Carlini. Mr. Monasky's re-evaluation of all the data again reached the conclusion that ULNB met the RACT regulatory criteria for the two boilers and should be installed as the appropriate control option. (Exh. C-12; Tr. 56-58).

57. In July 1997, DEP issued a denial of Sunoco's plan approval application, PA-23-001A (the July 1995 submission proposing combustion tuning for Boiler No. 6), and DEP returned the application. Sunoco did not file an appeal of the denial with the Board. (Stip. ¶ 11).

58. On September 11, 1997 DEP issued a Notice of Violation to Sunoco for its failure

to implement the NOx RACT determination for Boilers 6 and 7 and its failure to comply with requirements in the 1995 Compliance Permit related to the two boilers. Ms. Carlini decided to issue a Notice of Violation because, with the many shifting and unjustified submissions Sunoco had made to DEP over the past three years, DEP suspected that Sunoco was deliberately evading its legal obligation to comply with the RACT regulations for the two boilers. As of that time, all of the 130 other facilities under Ms. Carlini's supervision in the Southeast Region which were subject to the RACT program had complied with RACT requirements. DEP issued the Notice of Violation to encourage compliance by Sunoco. (Stip. ¶ 12; Exh. C-13; Tr. 191-93, 195).

59. The 1997 NOV requested Sunoco to provide DEP by early October with a detailed abatement plan explaining how it would correct the violations cited in the NOV for Boilers No. 6 and 7 for failure to comply with the requirements imposed by the 1995 Plan Approval and 1995 Compliance Permit. (Exh. C-13).

60. Sunoco formally responded to the 1997 NOV by a letter from Mr. Rabik dated October 1, 1997. The letter did not provide any information on how Sunoco planned to correct the violations for Boiler No. 6; nor did it provide any information with respect to installment of the required testing equipment. The NOV response stated that Sunoco had submitted another plan approval application for Boiler No. 7, which would now include a condition restraining the firing of Boiler No. 7 to less than 250 million BTU/hour. (Stip. ¶ 15; Exh. A-20; Tr. 196-98).

61. Shortly before submitting its NOV response, in mid-September 1997 Sunoco submitted to Mr. Monasky another proposal which included a letter and two plan approval applications. In the September 1997 application, Sunoco re-submitted its July 1995 withdrawal application for Boiler No. 6, again attempting to withdraw the 1995 Plan Approval. The submission contained no RACT analysis, and no supporting documentation; Sunoco referred to

its July 1995 submission and simply stated that it was adding Boiler No. 6 to its combustion tuning program. (Stip. ¶ 18; Exh. A-17 at 4822, 48225-29; Tr. 58-60).

62. The September 1997 application revives and resubmits the May 1996 plan approval application seeking to install SPUD burners on Boiler No. 7—which application Sunoco had disavowed in August 1996. At this point, Sunoco sought to install SPUD burners on Boiler No. 7, in conjunction with a condition that would "derate" that boiler, *i.e.*, the firing limit of the boiler would be capped at an upper limit by an express condition in the plan approval and operating permit. Sunoco asserted in its submission that if Boiler No. 7 was limited to an annual average firing rate of 250 million BTU/hr or less, then its most recent RACT analysis suggested that installation of SPUD burners would be the preferred RACT control option. No technical analysis or supporting documentation was included with the September 1997 application. (Exh. A-17 at 4822-23, 48230-34; Tr. 58-60, 77).

63. DEP treated the September 1997 submission as a formal application and, after review, Mr. Monasky determined that the application was administratively deficient. By letter dated September 29, 1997, DEP returned Sunoco's September 1997 application because of numerous administrative deficiencies; a checklist of the information required to complete the September 1997 application package was included with the letter. (Exh. A-19; Tr. 61; Stip. ¶ 14).

64. In early December 1997, Sunoco responded to DEP's September 1997 administrative deficiency letter. Mr. Monasky reviewed this submission and determined that Sunoco had not complied with the information requirements for RACT applications. Mr. Monasky sent a second administrative deficiency letter. (Exhs. A-22, A-23; Tr. 62-63).

65. Sunoco responded to the second administrative deficiency letter in late December 1997; in early January 1998 DEP determined that the September 1997 application, No. PA-23-

001B, was administratively complete and DEP began its technical review of the application. (Stip. ¶¶ 16-17; Exh. C-15; Tr. 63-64, 668).

66. After completing his technical review of the September 1997 application, in mid-February 1998 Mr. Monasky sent Mr. Rabik a technical deficiency letter with a list of technical deficiencies in Application PA-23-001B. Among these deficiencies were requests for: information on how Sunoco would derate Boiler No. 7; a RACT analysis confirming that SPUD burners were the only economically and technically feasible control option for Boiler No. 7; a complete RACT analysis for Boiler No. 6; and, an explanation of how the application, which proposed combustion tuning for Boiler No. 6, satisfied the regulatory requirements for that boiler. (Stip. ¶ 19; Exh. A-25; Tr. 65-66).

67. Sunoco provided a response to DEP's technical deficiency letter by letter dated February 27, 1998. The submission provided some of the requested technical information, but failed to adequately respond. With respect to Boiler No. 6, the submission merely re-submitted the RACT analysis contained in the July 1995 RACT Proposal. No supporting documentation was provided for the Boiler No. 6 RACT analysis. (Stip. ¶ 20; Exh. A-26; Tr. 66-68).

68. The February 1998 submission contains a new RACT analysis for Boiler No. 7, but does not include any documentation to support the cost estimates or control efficiencies projected for various control options. In particular, Sunoco's analysis employs a control efficiency of less than 10% for ULNB; previous submissions projected a 75% NOx reduction efficiency, then a 36% reduction efficiency. The new assertion that ULNB could only attain less than a 10% reduction of NOx emissions for Boiler No. 7 was not supported with technical evidence of any kind by Sunoco. Upon review, Mr. Monasky concluded that the control efficiency of less than 10% for ULNB was unreasonable. (Exh. A-26 at p. 48165; Tr. 68-69, 72).

69. In addition, Sunoco discarded the ULNB option because it was proposing to derate Boiler No. 7 and limit the firing rate to less than 250 million BTU/hr. In the absence of derating, the analysis showed ULNB as the most appropriate RACT control option using an approximately 35% reduction efficiency for ULNB. With derating, Sunoco's RACT analysis showed SPUD burners as the only option that yielded a cost efficiency ratio of less than the $1,500 guideline threshold. (Exh. A-26 at p. 48165; Tr. 72-73).

70. DEP issued a second technical deficiency letter to Sunoco in April 1998 after reviewing the February 1998 submission. DEP again requested the technical documentation that would support Sunoco's RACT analyses. DEP also requested further information on the derating of Boiler No. 7, as well as other deficiencies. (Stip. ¶ 21; Exh. A-27; Tr. 73-74).

71. DEP met with Sunoco in early May 1998 to discuss the technical deficiencies of Application PA-23-0001B. As a result of that meeting, Sunoco provided additional information to DEP by letter dated June 30, 1998. (Stip. ¶ 22; Exh. A-28).

72. The June 1998 letter turns around again and states that Sunoco is not seeking to derate Boiler No. 7 by imposing a firing rate limit of 250 million BTU/hr as they had requested in Application PA-23-0001B. Nevertheless, the enclosed contract for SPUD burners and attached RACT analysis continue to assume that the SPUD burners would be coupled with derating. The RACT analysis for Boiler No. 7 also still employs a reduction efficiency of less than 10% for ULNB, without any supporting documentation. No RACT analysis for Boiler No. 6 was provided. (Stip. ¶ 23; Exh. A-28; Tr. 74-77).

73. Mr. Monasky reviewed the application materials, and conducted another review of Sunoco's previous NOx RACT analyses submitted over the past four years. Based on his review, he continued to find that ULNB should be installed on the two boilers as the preferred

NOx RACT control option, in part because Sunoco had not substantiated its claim that LNB and ULNB could achieve only between a 1.2% and 36% NOx reduction efficiency. DEP's review of the technical literature and other relevant data pertaining to LNB and ULNB had shown typical control efficiencies for these technologies of between 40%-80% when burning fuel gas and 35%-55% when burning fuel oil. Mr. Monasky prepared an internal memo in which he recommended that DEP deny Application PA-23-0001B. (Exhs. C-5, C-18; Tr. 78-80, 82-83).

74. By letter dated September 11, 1998, DEP denied Sunoco's Application PA-23-0001B for revision of the 1995 Compliance Permit with respect to Boilers No. 6 and 7 because the application failed to demonstrate that the NOx RACT proposal complied with relevant air permitting and RACT regulatory requirements. (Stip. ¶ 25; Exh. C-16; Tr. 80-81, 198-201).

75. Sunoco filed an appeal of DEP's denial of Application PA-23-0001B with the Board in October 1998; the matter was docketed at EHB Dkt. No. 98-200-MG. (Stip. ¶ 26).

76. DEP also issued an Air Pollution Abatement Order to Sunoco, dated September 11, 1998 (Abatement Order), which recited portions of Sunoco's relevant compliance history to date, that Sunoco had continued to operate Boilers No. 6 and 7 since June 1, 1995, but had failed to implement the NOx RACT determination or install the monitoring equipment as required by the 1995 Plan Approval and 1995 Compliance Permit. (Stip. ¶ 27; Exh. C-17; Tr. 201-204).

77. DEP considered it necessary to issue the Abatement Order to Sunoco because nearly two years had elapsed since the expiration of the 1995 Plan Approval, and a year had passed since DEP issued the Notice of Violation, all without achieving any further compliance with the RACT requirements for Boilers 6 and 7. Ms. Carlini believed that Sunoco was deliberately evading its legal obligations and that she had no choice but to issue the Abatement Order in an effort to obtain compliance from the company. She further testified that the

Abatement Order was the only such order issued for the 130 facilities under her supervision in the Southeast Region which were subject to the RACT regulatory requirements. (Tr. 201-204).

78. The Abatement Order ordered Sunoco to submit a new plan approval application consistent with the RACT determination made by DEP in the 1995 Plan Approval and 1995 Compliance Permit, *i.e.*, installation of ULNB on the two boilers and the certified continuous emission monitors. DEP would then issue a new plan approval to replace the expired 1995 Plan Approval. DEP also ordered Sunoco to implement the RACT control option requirements from the 1995 Compliance Permit by installing ULNB on Boilers 6 and 7 within 240 days of issuance of the replacement plan approval. (Stip. ¶ 27; Exh. C-17).

79. Sunoco filed an appeal of the Abatement Order with the Board in October 1998, which appeal was docketed at EHB Dkt. No. 98-201-MG. (Stip. ¶ 28).

80. Sunoco decided to install the SPUD burners on Boiler No. 7 in Autumn 1998 without any approval from DEP to do so, and at the risk of being ordered by DEP to remove the SPUD burners after they were installed. (Tr. 683-84, 707-08; Exh. C-19, Tr. 219-20).

81. In October 1998, DEP inspected the Facility and observed that Sunoco had installed the SPUD burners on Boiler No. 7 without first obtaining a plan approval from DEP to do so. (Stip. ¶ 32).

82. Sunoco's action of installing the SPUDs without obtaining a plan approval from DEP violated applicable regulations in 25 Pa. Code Chapter 125, the 1995 Compliance Permit, and the Abatement Order. DEP could have ordered Sunoco to immediately remove the SPUD burners from Boiler No. 7 and install ULNB as required by the 1995 Compliance Permit and the Abatement Order. Instead, DEP chose to work with Sunoco to find a means of bringing the SPUD burners into compliance with the RACT regulatory requirements. (Tr. 205-06, 208-09).

The 2001 Plan Approval and Revised Compliance Permit

83. Sunoco submitted a revised RACT analysis for Boiler No. 7 in early January 1999. DEP conducted a review of the information submitted by Sunoco and determined that the revised economic analysis for Boiler No. 7 still supported the original determination that ULNB should be installed as the appropriate RACT control option. (Exhs. C-20, C-21; Tr. 83-85, 221).

84. In February 1999 Sunoco met with DEP and proposed to meet the NOx emission limit for Boiler No. 7 with the already-installed SPUD burners. DEP agreed to allow Sunoco to submit a plan approval incorporating this proposal if Sunoco could demonstrate that the installed SPUD burners would achieve the preliminary NOx emission limit of 0.25 lb/MMBTU set forth in the 1995 Compliance Permit. (Stip. ¶ 33).

85. Sunoco conducted an emission test of Boiler No. 7 in April 1999 and submitted the test report to DEP in August 1999. The test showed that Boiler No. 7 with the installed SPUD burners achieved the preliminary NOx emission limit of 0.25 lb/MMBTU set forth in the 1995 Compliance Permit. (Stip. ¶ 34).

86. Approximately a year later, in July 2000 Sunoco submitted a plan approval application to DEP proposing to install LNB on Boiler No. 6, discontinue burning fuel oil on that boiler, and burn only fuel gas, as the appropriate RACT control option. Sunoco's application was initially determined to be administratively incomplete, due to a lack of information required by the regulations; in August 2000 Sunoco supplemented its application for Boiler No. 6. (Stip. ¶ 36; Exhs. A-34, A-35, A-36, Tr. 86, 91-92, 855-63, 867-68).[8]

87. In November 2000, Sunoco submitted a plan approval application for the

[8] Because the combustion of fuel oil generates higher levels of NOx emissions, installing LNB while continuing to burn fuel oil did not reduce emissions sufficiently to meet the RACT regulatory guidelines. The installation of LNB, coupled with a restriction limiting the boiler to burning fuel gas, would meet the RACT regulatory requirements. (Tr. 91-92).

installation of SPUD burners on Boiler No. 7. In April 2001 Sunoco submitted a request to revise the application for Boiler No. 7 by including a condition that Boiler No. 7 be derated and limited to a firing rate of 245 MMBTU/hr on an annual average basis. (Stip ¶¶ 37-38; Tr. 778).

88. On August 2, 2001, DEP issued to Sunoco: (1) a Plan Approval for the installation of LNB on Boiler No. 6 coupled with a condition restricting Boiler No. 6 to burning fuel gas; (2) a Plan Approval for the installation of SPUD burners on Boiler No. 7 coupled with a condition derating Boiler No. 7 to a firing limit of 245 MMBTU/hr; and, (3) a revised Compliance Permit for installation of LNB and SPUDs on Boilers 6 and 7 respectively as the NOx RACT for those two boilers. (Stip. ¶¶ 39-41; Tr. 91-92, 221-23).

89. In August 2001, the parties entered into a settlement agreement pursuant to which they resolved the appeals of the denial of Application PA-23-0001B and the Abatement Order, and Sunoco withdrew those appeals in September 2001. (Jt. Stip. at ¶ 1 and attachment).

90. Sunoco installed LNB on Boiler No. 6 in October 2001, in accordance with the August 2001 Plan Approval and revised Compliance Permit. (Tr. 413, 880).

Findings Relating to Sunoco's Intent

91. Sunoco was fully aware of the legal obligations imposed on the Facility by the RACT program and Sunoco intentionally failed to comply with the RACT regulations as applied to Boilers No. 6 and 7. (F.F. # 91).

92. Sunoco was fully aware of the legal obligations imposed on it by the 1995 Plan Approval and 1995 Compliance Permit and Sunoco intentionally failed to comply with those obligations during the entire period from June 1996 through September 2001. (F.F. # 92).

93. Sunoco deliberately avoided and delayed its compliance with the RACT regulations, as applied to Boilers No. 6 and 7, for the purpose of obtaining a financial benefit from its noncompliance. (F.F. # 93).

94. Sunoco deliberately avoided complying with the 1995 Plan Approval and 1995 Compliance Permit with respect to Boilers No. 6 and 7, during the entire period from June 1996 through September 2001, for the purpose of obtaining a financial benefit from its noncompliance. (F.F. # 94).

The Civil Penalty Assessment

95. DEP issued a Civil Penalty Assessment to Sunoco on September 27, 2002 (the Penalty). The Civil Penalty Assessment recited Sunoco's relevant compliance history, and determined that Sunoco's continuous operation of Boiler No. 6 from June 1995 through September 2001 without implementing the NOx RACT determination in the 1995 Plan Approval and 1995 Compliance Permit constituted violations of the RACT regulations and the APCA. Similarly, DEP determined that the continuous operation of Boiler No. 7 from June 1995 through October 15, 1998 without implementing the NOx RACT determination in the 1995 Plan Approval and 1995 Compliance Permit violated the RACT regulations and the APCA. DEP assessed a total penalty of $3,465,660.00 for the violations. (Tr. 223-24; Exh. C-23).

96. Brian Trowbridge is employed by DEP as an Air Quality Program Specialist in the Division of Air Resources Management. He commenced employment with DEP in 1994 as an Air Quality Specialist and was promoted in 1997 to Compliance Specialist. He was responsible for calculating the Penalty and submitting the Penalty to Ms. Carlini for ultimate approval. (Tr. 405-08, 223-24).

97. Mr. Trowbridge reviewed Sunoco's relevant compliance history and the RACT permit application files, and he consulted DEP personnel with knowledge of the relevant factual background, including Mr. Monasky, Mr. Ruhl, and Ms. Carlini, as part of the process of calculating the Penalty. (Tr. 408-10).

98. When assessing the Penalty, Mr. Trowbridge considered the applicable statutory

factors prescribed by the APCA, and applied those factors to the factual circumstances of Sunoco's violations. The factors he considered applicable included: damage to air or other natural resources of the Commonwealth; the willfulness of the violations; the severity and duration of the violations; the relevant compliance history of the source; the degree of cooperation in resolving the violation exhibited by Sunoco and the speed with which compliance was ultimately achieved; the financial benefit to Sunoco in consequence of the violations; the costs to DEP resulting from the violations and efforts to achieve compliance; and, the deterrence of future violations. (Tr. 410-30; Exh. C-22; 35 P.S. § 4009.1).

99. Mr. Trowbridge also referred to a DEP published guidance policy titled Guidance for Application of Regional Civil Assessment Procedure, Doc. No. 273-4130-003 (the Guidance Policy) for assistance in determining the precise amount of the Penalty. The Guidance Policy outlines procedures for calculating penalties for various types of APCA violations, and generally tracks the criteria set forth in the APCA for assessing civil penalties. (Tr. 416-17; Exh. A-13).

100. The Penalty is comprised of two main components—the gravity component and the economic benefit component—and a separate analysis was performed for each boiler. The gravity component accounts for the statutory factors of environmental impact, willfulness, severity and duration of the violations, compliance history, and the degree of cooperation in resolving the violations. The economic benefit component accounts for the financial benefit Sunoco received from its violations. (Tr. 410-30; Exh. C-22).

The Gravity Component

101. To determine the gravity component of the Penalty, Mr. Trowbridge generally followed the recommendations of the Guidance Policy. (Tr. 416-25; Exhs. A-13, C-22).

102. Robert Kulp is currently employed by DEP as the Chief of the Division of Compliance and Enforcement and he has been employed by DEP or its forerunners since 1970.

His current responsibilities include formulating statewide policy and guidance for DEP field offices and acting as liaison with the enforcement branch of the EPA. (Tr. 317-20).

103. Mr. Kulp was involved with the RACT program development and assisted with formulation of the RACT regulations. He also assisted in drafting the Guidance Policy and he is the sole author of the RACT penalty policy section in the Guidance Policy. (Tr. 320, 322-25).

104. For RACT program violations, the Guidance Policy suggests that the degree of environmental impact be assessed by utilizing a modified structure normally applied to violations of an annual emission limit such as that set by a permit. In the annual emission limit violation context, a "base penalty" is calculated by ascertaining the actual quantity of pollutant over the allowable limit which was emitted by the violating source (tons over allowable). A dollar value is then assigned to each ton emitted over the allowable limit to calculate the base penalty. (Exh. A-13 at pp. 13, 20-21).[9]

105. The specific dollar amount assigned to each ton over allowable is determined based on two other applicable factors: willfulness, and the severity and duration of the violations. A higher value is assigned for willful or persistent violations as opposed to simply negligent violations. In addition, violations which occur in a geographic area classified as severe non-attainment are assigned a higher penalty per ton over allowable than those occurring in areas in which the air quality is not so severely impaired. (Exh. A-13 at p. 13).

106. For RACT violations, the Guidance Policy modified the basic emission-limit violation structure to reflect the characteristics of the RACT control program. Unlike the operating permit violation context, a penalty for a violation of the RACT regulations would result from a failure to install the appropriate RACT control option in a timely manner. In

[9] So, for example, if an operating permit allowed the source to annually emit only 100 tons of NOx, and the source actually generated 150 tons, the tons over allowable would equal 50 tons. A specific dollar value, say $1,000, would be assigned for each ton over allowable, resulting in a base penalty amount of $50,000.

addition, RACT determinations could only establish preliminary emission limits, based on projected control efficiencies of selected RACT control equipment, and final limits could not be set until the equipment was installed and tested over a period of months. Finally, the effectiveness of RACT control equipment is measured in terms of percentage reduction of NOx or VOC. Consequently, the Guidance Policy recommended that the quantity of tons over allowable be calculated by applying a percentage reduction that the source would have achieved if the RACT control option had been installed on time to the source's annual emission of NOx. (Tr. 333-39; Exh. A-13 at pp. 13, 20-21).[10]

107. The question raised by this modified structure was what percentage reduction should be utilized to calculate the base penalty. Mr. Kulp testified that more than 500 facilities in the Commonwealth were subject to the RACT regulations, which provide for case-by-case analysis for affected sources, and, that a wide range of control options and efficiencies would necessarily be employed by facilities complying with the RACT regulations. In order to assure statewide consistency in enforcement actions, to provide the regulated community with advanced notice of its potential liability for failure to timely install RACT, and to avoid penalizing entities who selected RACT with higher control efficiencies, the Guidance Policy recommended using a percentage reduction figure of 50% when calculating the base penalty for RACT violations. (Tr. 327-38, 333-39; Exh. A-13 at p. 21).

108. To calculate a base penalty for Boiler No. 6, Mr. Trowbridge first decided upon the period of non-compliance for the source. He set the commencement date as June 1, 1996 because the 1995 Compliance Permit required that ULNB be fully installed on Boiler No. 6 by

[10] As an example: suppose a source was required to install the approved NOx RACT control option by January 1, 1996 and failed to install the equipment until December 31, 1996; the source emitted 200 tons of NOx during 1996; and the projected control efficiency of the approved RACT was 75%; then the tons over allowable figure used for calculating the penalty would be 75% of 200 tons or, 150 tons of NOx.

no later than May 31, 1996. He set the end date of non-compliance as September 30, 2001 because Sunoco finally installed LNB on Boiler No. 6 pursuant to the 2001 Compliance Permit in mid-October 2001. Mr. Trowbridge then credited Sunoco with three months on account of DEP's decision to issue the 2001 plan approvals and permits for both boilers simultaneously, thereby delaying the issuance of the final permit for Boiler No. 6 by approximately three months. The period of non-compliance used by DEP to calculate the base penalty for Boiler No. 6 thus ran from June 1, 1996 through June 30, 2001. (Tr. 412-13; Exh. C-22).

109. Mr. Trowbridge ascertained the quantity of NOx emitted by Boiler No. 6 annually during the non-compliance period, adjusting for the half year in 1996 and 2001 respectively, using the Air Information Management System reports submitted by Sunoco for the Facility during the relevant years. Based on these reports, Boiler No. 6 emitted 182 tons of NOx during the 1996 half-year period; 373 tons in 1997; 370 tons in 1998; 329 tons in 1999; 357 tons in 2000; and 111 tons in the 2001 half-year period. (Tr. 413-16; Exhs. C-28; C-22).

110. DEP followed the Guidance Policy recommendation and used a 50% reduction figure to calculate the quantity of tons of NOx over allowable emitted by Boiler No. 6 annually during the non-compliance period. The resulting figures were: 91 tons of NOx over allowable in the 1996 half-year period; 186.5 tons in 1997; 185 tons in 1998; 164.5 tons in 1999; 178.5 tons in 2000; and 55.5 tons in the 2001 half-year period. (Tr. 418-19; Exh. C-22).

111. The Guidance Policy recommends an $800 penalty per ton of pollutant over allowable, for the first 25 tons over allowable, if the violation is willful and/or persists for more than a year and the violation occurs within a severe nonattainment area for NOx. The Guidance Policy recommends applying a penalty of $1,600 per ton for emissions in excess of 25 tons over allowable, again where the violation is willful and/or persists for more than a year and the

violation occurs within a severe nonattainment area. (Exh. A-13 at p. 13).

112. Mr. Trowbridge decided to adopt these recommended amounts in the Guidance Policy and, in calculating the base penalty for Boiler No. 6, he assigned a penalty per ton of $800 for the first 25 tons over allowable and a penalty of $1,600 per ton for those emissions exceeding 25 tons over allowable. He decided to use these amounts because the violations had occurred in a severe nonattainment area for ozone, because he determined from his review of the relevant compliance history that the violations were willful, and because the violations persisted for more than five years. (Tr. 419-22; Exh. C-22).

113. The resulting base penalty was $125,600 for the 1996 half-year period; $278,400 for 1997; $276,000 for 1998; $243,200 for 1999; $265,600 for 2000; and $68,800 for the 2001 half-year period. (Tr. 419-22; Exh. C-22).

114. The base penalty amounts for Boiler No. 6 for each year (or half-year) were adjusted to account for several other statutory factors: the degree of cooperation by Sunoco in resolving the violations; the speed with which compliance was ultimately achieved; the duration of the violation; and the overall compliance history of the source. (Tr. 422-24; Exh. C-22).

115. Based on his review of the relevant factual background, Mr. Trowbridge determined that Sunoco had not been cooperative in resolving the violations. Accordingly, he adjusted the base penalty for Boiler No. 6 upward by an increment of 10% for each of the annual or semi-annual periods. (Tr. 422-24; Exh. C-22).

116. Mr. Trowbridge also decided to adjust the base penalty amounts upward to account for the overall compliance history of the source. He explained that compliance history, in part, reflects the duration and persistence of the violations—generally the longer the violator delays its compliance, the greater the added increment to the base penalty. He did not adjust the

base penalty upward for "compliance history" during the 1996 period of non-compliance. He increased the base penalty for 1997 by 10%; increased the base penalty for 1998 by 20%; and then increased the base penalty for 1999 by 30%; for 2000 by 30%; and for the 2001 half-year period also by 30%. (Tr. 422-24; Exh. C-22).

117. Summing the adjusted base penalty amounts for each of the five years of non-compliance, a total base penalty for Boiler No. 6 amounted to $1,639,680. (Tr. 425; Exh. C-22).

118. To calculate a total base penalty for Boiler No. 7, Mr. Trowbridge employed essentially the same procedure. He first determined that the period of non-compliance ran from June 1, 1996 through September 30, 1998. He ascertained the quantity of NOx emitted by Boiler No. 7 during that period, calculated the tons over allowable using the 50% control efficiency figure, and assigned a penalty of $800 per ton for the first 25 tons over allowable and $1,600 per ton for emissions exceeding 25 tons over allowable. He adjusted the base penalty upward by 10% for the 1996, 1997 and 1998 periods to account for the degree of cooperation factor. For the "compliance history" factor, he did not adjust upward for the 1996 period, but did increase the base penalty by 10% for 1997, and by 20% for the 1998 period. (Tr. 428-30; Exh. C-22).

119. Summing the base penalty amounts for the individual years, he calculated a total base penalty amount of $434,720 for Boiler No. 7. (Tr. 428-30; Exh. C-22).

The Economic Benefit Component

120. The Penalty also included an economic benefit component. James Bixby was responsible for computing the financial benefit of noncompliance obtained by Sunoco from its violations, and Mr. Trowbridge incorporated the figure computed by Mr. Bixby for Boiler No. 6 in his calculation of the overall Penalty amount. (Tr. 213-14, 425-26, Exh. C-22).

121. James Bixby is currently employed by DEP as a financial investigator and has been employed in that capacity since 1992. He obtained a B.S. in business administration with a

major in accounting in 1978 and obtained a CPA license in 1991; he has extensive private-sector experience as an accountant and worked as a corporate tax auditor with the Pennsylvania Auditor General's office. He has received substantial training specifically in economic benefit analysis, including training in the use of the EPA's BEN computer model—which training was conducted by the EPA technician responsible for developing that model. He has been qualified numerous times as an expert witness in financial analysis. (Tr. 467-71).

122. Mr. Bixby was qualified as an expert in: analysis of the economic benefit of non-compliance; and, the use of the BEN computer model. (Tr. 472-73).

123. After consulting with Mr. Trowbridge to obtain the necessary factual information to perform the economic benefit analysis, Mr. Bixby employed the BEN Model to calculate the economic benefit received by Sunoco from its failure to comply with the NOx RACT determination in the 1995 Plan Approval and 1995 Compliance Permit (*i.e.*, its avoidance of the requirement to install ULNB on Boilers No. 6 and 7) and its delay in ultimately achieving compliance by installing SPUD burners on Boiler No. 7 in late 1998 and LNB on Boiler No. 6 in late 2001. Mr. Bixby prepared separate economic benefit analyses for Boiler No. 6 and Boiler No. 7. (Tr. 473-93; Exhs. C-31, C-37, C-38, C-39).

124. The BEN computer model was developed by EPA to calculate the economic benefit a violator derives from delaying and/or avoiding compliance with environmental statutes.[11] To determine such economic benefit, the BEN model uses standard financial cash

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[11] As explained in the BEN User's Manual:

> Compliance with environmental regulations usually requires a commitment of financial resources; both initially (in the form of a capital investment or one-time nondepreciable expenditure) and over time (in the form of annually recurring costs). . . .
>
> Economic benefit represents the financial gains that a violator accrues by delaying and/or avoiding such pollution control expenditures. Funds not spent on environmental compliance are available for other profit-making activities or, alternatively, a defendant avoids the costs associated with obtaining additional funds for environmental compliance. . . . Economic benefit

flow and net present value techniques. Basically, the model calculates the costs of complying on-time and of complying late, adjusted for inflation and tax deductibility, and then compares the present value of net after-tax cash flows in the two cases. The economic benefit is the difference in the present value of costs in the two cases. (Tr. 471-72; Exh. C-27 at 1-2, 1-3; Exh. C-31 at 1).

125. In performing the economic benefit analysis for Boiler No. 6, Mr. Bixby input certain factual data into the BEN computer model. He utilized June 1, 1996 as the initial date of Sunoco's non-compliance (the date by which installation of the ULNB was required pursuant to the 1995 Plan Approval and Compliance Permit); and used November 1, 2001 as the compliance date (the date by which the LNB were fully installed on Boiler No. 6 pursuant to the 2001 Plan Approval and revised Compliance Permit). (Tr. 475-78; Exh. C-31).

126. For the cost to Sunoco of on-time compliance, Mr. Bixby used the estimate of the cost to install the ULNB on Boiler No. 6 provided by Sunoco in its July 1994 and September 1994 RACT Proposals and plan approval applications; the total cost to install ULNB on Boiler No. 6 as provided by Sunoco was $1,550,554. This figure represented the capital investment that Sunoco would have made for ULNB, had Sunoco complied in a timely manner—*i.e.*, the on-time compliance capital investment. Mr. Bixby did not add any costs for one-time non-depreciable expenditures or for annually recurring incremental costs associated with the installation of ULNB on Boiler No. 6. (Tr. 478-86; Exh. C-31; *see also* F.F. # 19).

127. For the cost to Sunoco of its delayed compliance, Mr. Bixby used the estimate of the cost to install LNB on Boiler No. 6 supplied by Sunoco in its July 2000 RACT proposal and

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> calculates the amount by which a defendant is financially better off from not having complied with environmental requirements in a timely manner. . . .
>
> The appropriate economic benefit calculation should represent the amount of money that would make the violator indifferent between compliance and noncompliance.

(Exh. C-27 at p. 1-2).

plan approval application; Sunoco estimated the cost to install LNB as $500,000. This figure represented the capital investment Sunoco made to ultimately comply with the RACT regulations in 2001—or the delayed compliance capital investment amount in the BEN model. Again, no one-time or annually recurring costs were added. (Tr. 478-86; Exh. C-31; *see also* F.F. # 86).

128. Mr. Bixby employed a marginal tax rate of 41.5% for the relevant period 1996 through 2001, a discount rate of 8.0% based on Sunoco's average long-term debt rate during the period, and the Chemical Engineering Plant Cost Index for the inflation index. Mr. Bixby relied on information found in Sunoco's annual reports during the relevant period when determining an appropriate marginal tax rate and discount rate. (Tr. 486-88; Exhs. C-31; C-34, C-35, C-36).

129. Mr. Bixby performed the economic benefit analysis for Boiler No. 6 using these figures in the BEN model, and he opined that Sunoco obtained an economic benefit from its delay/avoidance of compliance in the amount of $1,391,260.

130. When calculating the economic benefit realized by Sunoco from Boiler No. 6 noncompliance, the figures used by Mr. Bixby for the delayed compliance capital investment, the marginal tax rate, and the discount rate, actually favored Sunoco. The total cost incurred by Sunoco to install the LNB on Boiler No. 6 in 2001 was $440,801; the actual marginal tax rate ranged from 0% to 23% during the relevant period; and Sunoco's weighted average cost of capital was approximately 10%. (Tr. 502, 656-58; Exh. A-39, at pp. 9-10; Exh. C-39).

131. Mr. Bixby's use of the conservative figures that he selected resulted in the calculation of a significantly lower economic benefit for Boiler No. 6. Had he employed the marginal tax rates and discount rate utilized by Sunoco's economic benefit expert, Mr. Bixby calculated that the economic benefit of noncompliance for Boiler No. 6 would have amounted to $2,625,515. (Tr. 486-88, 502, 656-58; Exh. A-39, at pp. 9-10; Exh. C-39).

132. Mr. Bixby also performed an economic benefit analysis for Boiler No. 7 using the BEN model and the same basic inputs, with the exception of the compliance date and the delayed compliance capital investment amount. The cost of on-time compliance remained the same because Sunoco was also required to install ULNB on Boiler No. 7 and had submitted the same cost estimate of approximately $1.5 million for installing ULNB on Boiler No. 7. Mr. Bixby used the actual costs of installing the SPUD burners incurred by Sunoco in 1998, $231,333, for the delayed compliance capital investment. Using these inputs in the BEN model, he determined that Sunoco received an economic benefit from its delay/avoidance of compliance with respect to Boiler No. 7 in the amount of $1,540,927. (Tr. 490-91; Exh. C-37).

133. We find Mr. Bixby to be a credible expert witness and we credit his expert testimony on the financial analyses he performed, his use of the BEN model, and his determination of the economic benefit Sunoco received from its delay/avoidance of compliance with the RACT regulations with respect to Boilers 6 and 7. His expert testimony was grounded in the relevant facts of this case, was supported by the BEN User's Manual, and accorded with sound principles of reason and logic. (F.F. # 133; Tr. 478-544; Exh. C-27, at pp. 1-2 to 1-3 and 3-21 to 3-22; Exhs. C-31; C-37, C-38, C-39).

134. Darren J. Tapp was qualified as an expert on behalf of Sunoco in: accounting, finance, assessing economic impact based on compliance or lack of compliance, and the use of the BEN model. Mr. Tapp has a 1988 B.S. in accounting and finance, and a 1993 M.B.A.; he is employed as a director in the dispute analysis and investigations practice of Price Waterhouse Coopers, LLC. He has extensive experience as an accountant in private accounting firms and in the assessment of economic benefit from noncompliance. (Tr. 929-34, 942-49).

135. After conducting an investigation of the relevant factual background through a

review of documents and discussions with Sunoco personnel with knowledge, Mr. Tapp performed economic benefit analyses for Boilers 6 and 7 using the BEN model. (Tr. 949-52; Exh. A-39, at pp. 1-3).

136. Mr. Tapp took a fundamentally different approach in applying the BEN computer model to this case. He did not compare the estimated cost of installing the required ULNB on Boiler No. 6 as of June 1996 with the cost of installing LNB on Boiler No. 6 in late 2001. Similarly, he did not compare the estimated cost of installing the required ULNB on Boiler No. 7 with the cost of installing SPUD burners on Boiler No. 7 in late 1998. (Tr. 978-92; Exh. A-39).

137. Instead, for Boiler No. 6, Mr. Tapp performed the analysis of the cash-flow streams as if Sunoco would have installed LNB on that boiler by June 1996, as opposed to being required to install ULNB on Boiler No. 6 by the, unappealed, 1995 Plan Approval and 1995 Compliance Permit. In basic terms, he treated this case as though it were only a delay case, instead of a delay/avoidance case. (Tr. 978-92; Exh. A-39).

138. Mr. Tapp's decision to employ this form of analysis was based on flawed factual assumptions. He testified that that his form of analysis assumed that there existed uncertainties as to which pollution control measure was required to be installed on the two boilers as of the date of non-compliance. He testified on direct that he was uncertain as to what Sunoco was required to install as RACT on the two boilers as of June 1996; he also did not indicate any knowledge of the 1995 Plan Approval and 1995 Compliance Permit. (Tr. 980, 1047).

139. On cross-examination, Mr. Tapp conceded that his expert report was based on the mistaken understanding that the RACT control equipment Sunoco ultimately installed on the two boilers was the same type of equipment Sunoco would have installed back in 1996 if they had complied on time. His explanation of his overall approach evidenced a distorted reading of the

BEN User's Manual and a general lack of familiarity with the compliance history of this case relevant to his analytical approach. Mr. Tapp conceded that when he prepared the analysis contained in his expert report, he did not know that the 1995 Plan Approval and Compliance Permit in fact required a different RACT control option to be installed than what was ultimately installed on Boilers 6 and 7. (Tr. 1029-40, 1041-48, 1052-53, 1072-75).

140. Mr. Tapp's testimony and the analysis in his expert report contain other similar factual inconsistencies and theoretical defects. The figure he used for the capital investment cost for LNB installed on Boiler No. 6 includes $100,000 for a theoretical cost labeled "dual-fuel capability costs." This theoretical cost was added based on Mr. Tapp's assumption that Sunoco had elected to forego the ability to use oil as a fuel option on Boiler 6 when installing the LNB in 2001 "for operational reasons unrelated to compliance." Mr. Tapp agreed on cross-examination that the "duel-fuel capability costs" should not have been added if it was related to compliance. In point of fact, Sunoco was required to stop burning fuel oil as a condition for coming into compliance when installing LNB on Boiler No. 6. In addition, Sunoco did not actually spend the $100,000 duel-fuel cost when the company installed the LNB, so its inclusion as part of the delayed compliance capital investment amount conflicted with the precepts of the BEN model. (Tr. 495, 884, 954-56, 1052; F.F. # 86, 88).

141. Finally, in his analysis of Boiler No. 7, Mr. Tapp concluded that Sunoco suffered an economic detriment (rather than any economic benefit) from a delay in installing SPUD burners on that boiler from 1996 until 1998. Aside from the mistaken factual assumption that Sunoco would have installed SPUD burners on Boiler No. 7 by the compliance date, Mr. Tapp's analysis for Boiler No. 7 included an annually recurring savings to Sunoco of $125,000 from installing SPUD burners. This savings allegedly resulted from the SPUD burners being more fuel

efficient than the prior burners on Boiler No. 7. (Tr. 962-64; Exh. A-39, at 7-8, 11-12).

142. The fuel-efficiency savings amount included by Mr. Tapp was not reasonably supported by the evidence. No systematic study of the alleged fuel savings was undertaken by Sunoco. James Vander Haar, Sunoco's energy coordinator at the Facility, testified that he did not know why he believed the SPUD burners were more efficient; he suggested that the improved fuel efficiency he noticed may arise simply from the fact that the prior burners were not properly sized. (Tr. 898-912, 916-23, 497-98).

143. We do not find Mr. Tapp's expert testimony credible, nor do we find credible the analysis contained in his expert report. Mr. Tapp's economic benefit analysis conflicted with the actual facts of this case, was not supported by the BEN User's Manual, and did not accord with reason. (F.F. # 143).

The Total Penalty

144. Mr. Trowbridge incorporated the amount of the economic benefit calculated by Mr. Bixby for Boiler No. 6—$1,391,260—into the total Penalty calculation. Mr. Trowbridge then considered the statutory factors of costs to DEP, deterrence, and other relevant factors with respect to Boiler No. 6. He decided not to include any amounts for these three factors in his calculation of the penalty amount for Boiler No. 6. (Tr. 425-27; Exh. C-22).

145. DEP decided to forego including any economic benefit component for Boiler No. 7 when assessing the Penalty. (Tr. 213-14; Exh. C-22).

146. Mr. Trowbridge considered the factors of costs to DEP, deterrence, and other relevant factors with respect to Boiler No. 7, and he decided not to include any amounts for these three factors in his calculation of the penalty amount for Boiler No. 7. (Tr. 427-30; Exh. C-22).

147. Mr. Trowbridge then summed the total base penalty for Boiler No. 6 of $1,629, 680 and the economic benefit component for Boiler No. 6 of $1,391,260 to obtain a total penalty

for Boiler No. 6 of $3,030,940; that amount was then added to the total base penalty for Boiler No. 7 of 434,720 to obtain a total penalty calculation of $3,465,660. (Tr. 427-30; Exh. C-22).

148. The penalty calculated by Mr. Trowbridge was approved by Ms. Carlini, and DEP issued the Civil Penalty Assessment to Sunoco in the amount of $3,465,660 on September 27, 2002. (Tr. 223-24; Exh. C-23).

DISCUSSION

I. Standard of Review

The Board reviews all DEP final actions *de novo*. *Pequea Township v. Herr*, 716 A.2d 678, 686-87 (Pa. Cmwlth. 1998); *Smedley v. DEP*, 2001 EHB 131, 155-60. DEP bears the burden of proof with respect to the civil penalty assessed against Sunoco. 25 Pa. Code § 1021.122(b)(1). To carry its burden, DEP must prove by a preponderance that: (1) the underlying violations of law giving rise to the assessment in fact occurred; (2) the penalty imposed is lawful; and, (3) the penalty is reasonable and appropriate. *See, e.g., Stine Farms & Recycling, Inc. v. DEP*, 2001 EHB 796 811-13.

In reviewing the penalty calculation, we must ascertain whether DEP properly applied the statutory penalty-assessment criteria to the facts of the case, and whether the penalty amount is reasonable and appropriate for the violations and surrounding circumstances. *F.R. & S., Inc. d/b/a/ Pioneer Crossing Landfill v. Department of Environmental Protection*, 761 A.2d 634, 639 (Pa. Cmwlth. 2000) (penalty amount must be reasonable); *Keinath v. DEP*, No. 2001-253-MG, 2003 Pa. Envirn. LEXIS 9, at *14-*15 (EHB, Jan. 31, 2003); *202 Island Car Wash, L.P. v. DEP*, 2000 EHB 679, 690. Where DEP has erred in its application of the statutory criteria, or assessed an unreasonable penalty amount, the Board may adjust the penalty. *Pickelner Fuel Oil, Inc. v. DEP*, 1996 EHB 602, 609.

II. Discussion

Sunoco stipulated to its liability for the violations underlying the Penalty. It is also undisputed that DEP was authorized by statute to assess a penalty for Sunoco's violations and that the penalty does not exceed the lawful amount permitted by the APCA.[12] Thus, the only question presented in this case is whether the Penalty is reasonable and appropriate. Sunoco challenged various aspects of the methodology DEP employed in calculating the Penalty and the overall reasonableness of the amount.

We find that DEP has met its burden of proving that it properly applied the penalty-assessment factors set forth in the APCA and that the Penalty amount is reasonable and appropriate for the facts of this case. While Sunoco suggested various other manners of calculating a penalty the result of which would be a much lower penalty, we do not conclude from its various alternative approaches that the Department's approach was in error so as to require us to abandon or correct it.

Pursuant to Section 9.1 of the APCA:

> In determining the amount of the penalty, the department shall consider the willfulness of the violation; damage to air, soil, water or other natural resources of the Commonwealth or their uses; financial benefit to the person in consequence of the violation; deterrence of future violations; cost to the department; the size of the source or facility; the compliance history of the source; the severity and duration of the violation; degree of cooperation in resolving the violation; the speed with which compliance is ultimately achieved; whether the violation was voluntarily reported; other factors unique to the owners or operator of the source or facility; and other relevant factors.

35 P.S. § 4009.1(a).

DEP applied the statutory criteria first by dividing the Penalty calculation into two main

[12] Section 9.1 of the APCA states in relevant part: "In addition to proceeding under any other remedy available at law or in equity for a violation of a provision of this act or any rule or regulation promulgated under this act, or any order, plan approval or permit issued pursuant to this act, the department may assess a civil penalty for the violation. The penalty may be assessed whether or not the violation was wilful. The civil penalty so assessed shall not exceed . . . twenty-five thousand dollars ($25,000.00) per day for each violation which occurs in the fifth year and all subsequent years following enactment of this section." 35 P.S. § 4009.1(a).

components: (1) the gravity component; and (2) the economic benefit component. DEP then calculated amounts for each component for the two separate boilers. The agency then examined the remaining relevant factors for each boiler and determined not to add amounts for certain relevant factors. Finally, DEP made adjustments which significantly decreased the resulting penalty.

A. The Gravity Component

DEP's calculation of the gravity component of the Penalty was based on the following four input factors. First, damage to air or other natural resources of the Commonwealth. This component focuses on the measurable magnitude and temporal duration of the violations which, in turn, yields a quantity of unlawful emissions over that which were allowable. Second, the willfulness of the violations. Third, the degree of Sunoco's cooperation in resolving the violations. Fourth, the compliance history of the source, or, *i.e.*, the speed with which compliance with the RACT regulations was ultimately achieved for the two boilers. We find that DEP's approach and method of calculating each separate input of the gravity component of the Penalty was a reasonable and appropriate application of the statutory factors to the facts of this case.

1. *Damage To The Environment*

a. *Start Date and End Date of Non-Compliance*

DEP selected appropriate endpoints for the period of non-compliance, starting with the date by which the 1995 Plan Approval and 1995 Compliance Permit required ULNB to be installed and operational, and concluding with the installation of LNB and SPUD burners on the respective boilers. For Boiler No. 6, DEP then reduced the period by three months to account for any delay in issuing the 2001 revised permit for Boiler No. 6 arising from DEP's decision to issue the 2001 permits for the two boilers simultaneously. In its post-hearing brief, Sunoco does

not challenge DEP's determination of the non-compliance period, except to state that DEP delayed issuance of the permit for Boiler No. 6 "for at least three months." (Sunoco Post Hearing Brief, at 44). But Appellant does not assert, nor provide evidence, that the delay was any longer than the three months which DEP credited to Sunoco. Moreover, DEP used the 1998 date of installation of the SPUD burners for Boiler No. 7 as the end of the non-compliance period for that boiler, despite the fact that the SPUD burners were installed without first obtaining a plan approval and compliance permit—in violation of the APCA, the regulations, the 1995 Compliance Permit and the Abatement Order. Sunoco did not submit a plan approval application for the installation of SPUD burners on Boiler No. 7 until November 2000 and did not submit a final revised application for SPUDs and derating until April 2001. (F.F. No. 87).

We see nothing wrong with the non-compliance starting and ending dates the Department used. In fact, the ending date used seems to have been quite generous to Sunoco in light of its having installed the SPUD burners without proper permitting approval.

b. Quantity of NOx Emissions Over Allowable During Non-Compliance – The "Delta"

The essence of the inquiry here is the "Delta" (Delta) amount of NOx emissions, *i.e.*, how much NOx was emitted over the amount that was allowed to be emitted. The parties agree on the quantity of NOx emitted by Boilers 6 and 7 during the relevant non-compliance periods, Boiler 6 emitting 1,722 tons of NOx and Boiler 7 emitting 516 tons. Sunoco objects, however, to DEP's method of calculating the critical Delta amount.

DEP used the Guidance Policy's recommended figure of a 50% percent reduction of the actual emissions to calculate the tons over allowable Delta. We believe that DEP's use of the 50% percent reduction figure was justified generally as an appropriate application of the RACT regulations, and specifically by the facts of this case.

Mr. Kulp explained the research and thought process behind the Guidance Policy's method for calculating tons over allowable and the selection of the 50% reduction figure in connection therewith. The Guidance Policy was created to fit the specific concerns and nature of the RACT program. It is important to recognize that a civil penalty calculation for a RACT regulation violation comes in the context of a delay in the installation of the required RACT equipment. The period of delay or avoidance is the impetus for the penalty, and the violator is being penalized for emitting NOx that it would not have emitted had the violator timely complied. Thus, the structure used for violations of established permit limits makes sense as a basis, but it must be modified to fit the nature of the RACT violations. Moreover, the NOx RACT determination is based on analyses which measure control efficiency in terms of the percentage reduction of the affected source's baseline NOx emissions each control option will likely achieve. The specific question the penalty assessor must confront is: what percentage reduction of NOx would the violator have achieved if the violator had installed the required RACT control option in a timely manner.

In drafting the Guidance Policy, Mr. Kulp considered information about RACT NOx control efficiency levels provided by John Slade, Chief of the Division of Permits and Krishnan Ramamuthry, section chief in the air permits division. He learned that there is quite a wide variation in the level of control efficiencies depending on the technology employed. He found technologies ranging from 35% to 50% control efficiency to technologies ranging from 75% to 90% control efficiency.

Given the substantial number of facilities in the Commonwealth subject to the RACT regulations, the case-by-case analysis for affected sources, and the wide range of control options and efficiencies available and used by facilities complying with the RACT regulations, the

Guidance Policy recommends using a mid-point in the range of percentage reduction efficiencies that available RACT control options are capable of achieving. It seems to us that use of a mid-point 50% figure as the approach for calculating RACT penalty assessments is logical in that it assures statewide consistency in enforcement actions and provides the regulated community with advanced notice of its potential liability for failure to timely install RACT. A mid-point figure also avoids deterring entities from selecting RACT control options with higher control efficiencies when making their RACT proposals for fear that if they were later unable to timely install that option they would incur a greater liability.

That Mr. Kulp could have selected a different number than 50% is beside the point. DEP could have selected 35% or 10% as the control efficiency number for the Guidance Policy. Sunoco would like to see 35% or 10% used instead of 50% because the lower the percentage control, the higher the allowable emissions and the higher the allowable emissions the lower the penalty amount. It may appear at first blush that the selection of 50% versus 10% or 35% or some other percentage figure is arbitrary. Reflection on the overall development of the Guidance Policy and consideration of the underlying rationale for selecting the 50% number, however, belies that notion. First, there is no question that the number 50% is supportable as being within the range of control efficiencies that Mr. Kulp discovered in his research. Sunoco does not dispute that. Second, other percentage figures would not have been as good a fit as 50% to serve all of the considerations and goals that Mr. Kulp described to us as being in play in the RACT program. Finally, we found Mr. Kulp to be a credible witness on this subject and we accept his explanation of the development and theory behind the Guidance Document's selection of the 50% figure as well researched and considered, having a basis in fact, and most appropriate for the multiple purposes and goals of the RACT program.

With respect to the specific facts of this case, Mr. Trowbridge's decision to use the Guidance Policy's recommended figure of 50% was reasonable and appropriate. Indeed, in light of the fact that Sunoco's projected and its actual control efficiencies were higher than 50%, the use of which would have resulted in a higher penalty, Sunoco was the beneficiary of DEP's use of the 50% figure as to it in this case. The control efficiencies projected by Sunoco for ULNB in its initial RACT proposals were actually much higher than the 50% figure employed by Mr. Trowbridge. Sunoco had predicted a 75% control efficiency on both Boiler Nos. 6 and 7. *See* F.F. No. 17 and 24. Had Sunoco's higher projected control efficiencies been used, the Penalty would have been much higher. In addition, DEP determined the actual NOx control efficiency of the RACT options Sunoco ultimately installed (the LNB without oil on Boiler 6 and the SPUD burners with de-rating on Boiler 7) were 60% reduction for the LNB and 52% reduction for the SPUDs. Sunoco did not dispute these amounts nor that they would have been achieved if Sunoco had installed that same equipment back in 1996.[13]

Sunoco argues that DEP should have calculated tons over allowable by using yet another method and number. Sunoco says that DEP should have used the preliminary emission limits inserted into the 1995 Plan Approval and Compliance Permit. We disagree. The numerical limits inserted into the 1995 Plan Approval and Compliance Permit were preliminary. The preliminary limits were expressly conditioned in both the Plan Approval and the Compliance Permit with final limits to be imposed later, after months of testing data were obtained following installation

[13] Tr. 38-40, 793-94. This, of course, demonstrates the truth to the point that use of the 50% figure avoids the disincentive to selection of RACT options with control efficiencies higher than 50%. Had the Department used the Sunoco proposed much higher removal efficiency rates and the penalty been much higher, that would have been duly noted by companies throughout the Commonwealth and undoubtedly would have scared off many from selecting higher efficiency controls for fear that they were treading on very dangerous territory.

of the RACT equipment.[14] The preliminary limit numbers came from Sunoco and were set to be high just in case the RACT control option, once installed and performing, did not perform as expected, Sunoco would not be in instantaneous non-compliance.[15] Mr. Rabik of Sunoco admitted that these emissions limits were preliminary.[16] He also admitted that Sunoco fully understood those numbers to be preliminary and that the Department had the authority to change those numbers later when sufficient testing had been performed to demonstrate the actual emissions and emissions levels.[17] As we have shown, the actual performance was much better than projected which renders the preliminary numbers even less relevant for the purposes of the penalty calculation.

In addition, use of the preliminary limits would not accord with the nature of the RACT program, nor does that approach harmonize with the characteristics of a violation of the RACT regulations. Using these limits conflicts with the requirements of the RACT regulatory program and the specific facts of this case. The RACT program penalty scenario differs from the emission-limit violation situation. A RACT violation involves a delay in installing RACT equipment. The violator is not being penalized for exceeding an emission limit already in place for equipment previously installed but, rather, it is being penalized for what it should have done and the control of emissions that it would have accomplished had it timely complied. Using

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[14] The expressed conditional nature of these limits is evident in the Plan Approval, condition 5 where it states that, "The Department reserves the right to establish and impose more stringent limitations based on test results from stack testing and/or other continuous emission monitoring results". Ex. C-7, Condition No. 5. The Compliance Permit sets forth an emission limitation for NOx but specifically says that "to establish a final emission limitation for NOx at least six (6) months of data from [continuous emission monitors] on No. 6 boiler shall be submitted to the Department. The final emission limitation will be determined using the Shapiro-Wilk method". Ex. C-8, Condition C.3.

[15] Tr. 764, 1139-42, 1154-55.

[16] Tr. 763, 797-98.

[17] Tr. 763.

preliminary emission limits in the 1995 Compliance Permit does not fit conceptually with that regulatory underpinning because the regulator must look at the equipment that was required to be installed, and what that RACT would have achieved, regardless of the preliminary emission limits. Moreover, the RACT analysis is based on percentage reduction of NOx, not on the emission limits that a source must attain.

In sum, DEP's approach to the calculation of the Delta was well grounded in the law, the policy behind the law, and the specific facts of this case.

c. Willfulness

Having determined the number of tons of NOx over allowable that Sunoco's two boilers emitted during the non-compliance period, Mr. Trowbridge assigned a penalty amount per ton based on the factors of willfulness and severity of the violations. In calculating the base penalty for each boiler, DEP assessed $800 per ton of NOx for the first 25 tons over allowable and $1,600 per ton exceeding 25 tons over allowable. These figures were applied for the entire non-compliance period for each boiler. Sunoco objects to the use of these amounts for calculating the base penalty because it contends that its violations were not willful; rather, Sunoco argues that it was engaged in ongoing good-faith negotiations with DEP during the length of the relevant period.

We disagree with Sunoco's characterization of its actions at issue here. "An intentional or deliberate violation of law constitutes the highest degree of willfulness and is characterized by a conscious choice on the part of the violator to engage in certain conduct with knowledge that a violation will result." *202 Island Car Wash, L.P.*, 2000 EHB at 694. There is ample evidence to support a conclusion that Sunoco consciously chose to avoid and delay its compliance with the RACT regulations with respect to Boilers 6 and 7.

The Facility staff of environmental compliance officers was fully aware of the RACT regulatory requirements well in advance of the deadlines imposed for compliance. Yet Sunoco failed to comply with the 1995 Plan Approval and 1995 Compliance Permit knowing that they were properly issued, not appealed, and therefore legally binding. If Sunoco believed that the 1995 Plan Approval and/or 1995 Compliance Permit was based on defective information or otherwise infirm, the company had an obligation to timely appeal the Plan Approval and Compliance Permit to the Board. Otherwise, they had a legal obligation to comply with those DEP permitting actions. Sunoco made a conscious choice not to appeal the 1995 Plan Approval and Compliance Permit and then another series of conscious choices to not comply with them.

Sunoco's attempted excuse for either not appealing or not complying or both was Mr. Rabik's supposed belief the 1995 Plan Approval and Compliance Permit were "living documents" which would organically evolve over time. That belief is not credible. Mr. Rabik begrudgingly admitted at trial that the Compliance Permit was neither a draft nor a preliminary document.[18] In light of Mr. Rabik's background and experience, that of Sunoco's other environmental compliance officers, and Sunoco's status as a large and sophisticated corporation with good regulatory and litigation counsel, that testimony is completely incredible. In fact, if it were true we would be gravely concerned that Sunoco had placed this large, environmentally sensitive oil refinery which operates in a major population center in Southeastern Pennsylvania in less than capable hands. After hearing Mr. Rabik and the other Sunoco witnesses, reviewing their credentials and experience, we know that the contrary is so. We also note that the prime Sunoco actor who was responsible for RACT implementation at the Facility and Sunoco's liaison with the Department on the subject of RACT during most of the crucial time period, Ms. Chalpaty, was not presented by Sunoco as a witness. There was no explanation of her absence as

[18] Tr. 797-98.

a witness nor Sunoco's failure to produce her.

To accept the "living document" proposition as excuse, even in the context of willfulness analysis in a penalty case, would be thoroughly disrespectful to the Air Pollution Control Act, the legitimate role and legal status of the Department under the APCA and the Department's actions under the APCA. Moreover, it would be completely destructive of the Environmental Hearing Board Act (EHB Act). A duly issued Department permit is not to be considered a proposition or a proposal. The law requires that a permit be complied with. 35 P.S. § 4008. If a party is unhappy with its permit or any condition thereof, the EHB Act allows an appeal which must be timely. 25 P.S. § 7514(c). Even an appeal to the EHB does not automatically operate to suspend the obligation to comply. 25 P.S. § 7514(d)(1). Absent an appeal, as in this case, the permittee must comply with the issued action of the Department. Here, as we have said, Sunoco made the conscious choice to not comply with the legally mandated requirements. The contention now that it had a "white heart" because it viewed the 1995 Plan Approval and Compliance Permit as "living documents" is completely untenable.

In any event, there was a clear cold deliberateness and calculated nature to Sunoco's refusal to implement what it had been legally required to implement by the 1995 Plan Approval and Compliance Permit. For example, Mr. Rabik, the refinery's environmental manager, commented in an May 10, 1996 e-mail to an outside vendor that, "[w]e are currently under a requirement to reduce NOx emissions by May 31, 1996 [per the 1995 Plan Approval and Compliance Permit] which we will obviously not be able to meet, but can renegotiate the time frame."[19] Clearly, Sunoco was well aware what was legally required of it but deliberately and consciously chose not to comply.

[19] Ex. C-10

d. Compliance History and Degree of Cooperation.

Some of what we have said already regarding willfulness ties in to the analysis of both compliance history and degree of cooperation. Sunoco's conduct in this case demonstrates not only the high degree of willfulness which the Department accurately attributed to it and that we find as well, but also, and separately, a poor compliance history and low degree of cooperation. A close examination of Sunoco's course of conduct in this case, particularly the numerous and varied RACT proposals made by Sunoco after the July 1994 RACT Proposal, compel the conclusion that Sunoco was intentionally avoiding and evading complying with the RACT regulations for Boilers 6 and 7.

The starting point and salient feature of this course of dealing between Sunoco and the Department is Sunoco's conscious decision to not comply with the one RACT proposal it had made which the Department memorialized into its 1995 Plan Approval and 1995 Compliance Permit. The obvious errors, deliberate avoidance of the results of Sunoco's own RACT analyses, repeated turnarounds in positions and proposals, and constant lack of supporting technical and economic documentation for Sunoco's changes in direction, among other things, show that Sunoco's myriad "RACT proposals" thereafter were little more than a means of attempted avoidance, evasion and delay.

We note that Mr. Rabik directed that no effort would be made by Sunoco to comply with the RACT requirements for Boiler No. 7 during much of 1996 and all of calendar year 1997, and that it may plan on complying during a scheduled plant shutdown in 1998. (F.F. No. 54). It is clear that Sunoco was intentionally delaying compliance in order to avoid having to make a substantial capital investment in the two boilers while deciding whether or not to retire one or both of them from operation.

Obviously, all of this shows a serious, calculated and intentional lack of cooperation on Sunoco's part. DEP properly applied the adjustment multipliers to the base penalty to account for that. As the fact-finder we cannot agree with Sunoco's assertion that it was cooperating with DEP to resolve its deliberate failure to install ULNB on the two boilers as required. The record shows that it was not doing so. DEP's issuance of both an NOV and the Abatement Order, and Sunoco's failure to comply with the Abatement Order and intentional unlawful installation of the SPUD burners without authorization, are prime examples of the difficulties DEP encountered in obtaining compliance. The lengthy duration of the violations resulting from Sunoco's deliberate delays supports the use of the increasing adjustment factor for compliance history applied after the first year of non-compliance to the base penalty amount. The adjustment factors cannot be considered excessive or unreasonable when applied to the factual circumstances presented here.[20]

Sunoco's claim that it should have received a 10% adjustment downward for degree of cooperation because it submitted its RACT proposal on-time is not well taken. Yes, the Penalty Policy does provide for a 10% diminution factor for companies who had submitted their RACT applications on-time, and, yes, Sunoco had a RACT proposal in by July 13, 1996 which was on-time, but DEP's decision to not to apply that leniency factor to Sunoco in this case was appropriate.[21] As we have already discussed, Sunoco's pattern of activities after the Department's approval of its RACT Plan Approval, *i.e.*, the issuance of the 1995 Plan Approval and Compliance Permit completely belies the notion that Sunoco was cooperating as measured

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[20] The Department's application of aggravating factors for willfulness and for bad compliance history and for lack of cooperation do not result in redundant penalty enhancers for the same conduct. The Department's application of the willfulness factor only impacts the first year of non-compliance as the remaining years are not affected by degree of willfulness. Ex. A-13p. 13; Ex C-22; Tr. 422-24. The adjustment for Sunoco's compliance history is the converse. That adjustment does not impact the first year of non-compliance and only impacts subsequent years of non-compliance. Ex C-22. Also, the compliance history factor is distinct in nature and quality from the willfulness factor.

[21] Ex. A-13 p. 21. On-time in this context means July 15, 1994. 25 Pa. Code § 121.91(d). Sunoco's on-time RACT proposal is Ex. A-3.

any standard. Also, to be very precise, as part of Sunoco's refusal to implement the required RACT controls, Sunoco actually purported to withdraw its on-time RACT Proposal which DEP had already approved.[22] Ironically, it was Sunoco's on-time application which DEP had memorialized into a plan approval and permit, which Sunoco did not appeal and which was legally binding upon it that Sunoco deliberately refused to implement. Accordingly, we find no error in DEP's declination to apply the Policy's 10% negative adjustment for on-time permit submission to Sunoco here.[23]

B. The Economic Benefit Component

The backbone of the economic benefit component of the penalty is the application of the BEN Model. The BEN Model is described in detail in F.F. No. 124. Put simply, it is the computer model used to calculate the economic benefit derived by the violator from its violative conduct. The idea, of course, is to disgorge the benefit from the violator so as to insure that the violator does not profit from its violative conduct. The Department only assessed a penalty component for economic benefit in this case as to Boiler No. 6 and we will confine our discussion regarding economic benefit for now to that Boiler.

The disagreement between the parties is not whether the BEN Model should be used or about the structure of the BEN Model but purely in how the BEN Model should be applied to

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[22] Ex. A-11; A-15. Sunoco withdrew the on-time RACT application for Boiler No. 6 *via* new application dated July 12, 1995 which is Ex. A-11. It did the same for Boiler No. 7 *via* new application dated August 7, 1996 which is Ex. A-15. As we have discussed at length before, the purported withdrawal of these applications did not relieve Sunoco from the obligation of complying with the 1995 Plan Approval and Compliance Permit. Indeed, these purported withdrawals came after the issuance on June 8, 1995 of the unappealed Plan Approval and Compliance Permit which had been issued on the basis of the supposedly later withdrawn applications.

[23] DEP analogizes Sunoco's argument here to a person submitting a check on-time to pay a bill, having the check bounce and then arguing they should not have to pay the vendor's late payment charge. DEP Post Hearing Brief p. 48. That is a fairly apt analogy. Another one would be the son who kills his parents and then pleads for mercy on account of his being an orphan. Getting back to DEP's analogy, though, Sunoco's action exhibits a higher degree of consciousness and thus culpability as it is more akin to the person having put a "stop-payment" order on the submitted check which reflects a deliberate intent to halt the due payment. Either way, none of these parties, the check writer, the son or Sunoco is entitled to favorable consideration.

this case. In that respect, the economic benefit component of the case boiled down to DEP's expert, Mr. Bixby, versus Sunoco's expert, Mr. Tapp. The outcome of this battle of the experts is very significant in that Mr. Bixby's opinion was that Sunoco reaped an economic benefit of $1,391,260 in connection with its non-compliance as to Boiler No. 6 while Mr. Tapp's opinion is that the number was either $521,704 or $460,346 depending on whether you take DEP's alleged delay in issuing the ultimate permit to Sunoco.[24]

There is no question in our mind that Mr. Bixby was the more credible expert in this particular case. We found Mr. Bixby's testimony to be credible because it was well grounded in the relevant facts of this case. Mr. Bixby's had personal experience with the BEN Model which showed in that his opinions on the application thereof were supported by the principles set forth in the BEN User's Manual and by reason and sound logic. Mr. Tapp, on the other hand, exhibited a lack of knowledge about important facts of the case; facts relevant to the application of the BEN Model. Indeed, he had based his expert report on an admitted lack of knowledge about what his own client had been obligated to do for RACT in the beginning. Moreover, we found his testimony to be quite evasive on the topic of his lack of knowledge. In short, it was not possible in this particular case to place confidence in Mr. Tapp's testimony.

Sunoco asserted two main challenges to DEP's calculation of the economic benefit component. First, Sunoco says that Mr. Tapp's approach in applying the BEN model was more appropriate. Specifically, Mr. Tapp used a $540,801 figure for the on-time capital cost of compliance whereas DEP's expert used a figure of $1,550,450 for that BEN Model input. The $540,801 figure is that which Sunoco actually spent coming into RACT compliance for LNB on Boiler No. 6 in 1998 whereas the $1,550,450 figure is the cost estimate supplied by Sunoco in its two 1994 RACT proposals for ULNB on Boiler No. 6. Second, Sunoco says that the cost

[24] Tr. 489 and Ex. C-31 for Mr. Bixby's opinion and Tr. 997 and Ex. A-39 for Mr. Tapp's.

estimate for ULNB on Boiler No. 6 used by Mr. Bixby was inaccurate. We are not persuaded by either of these challenges.

Sunoco's first argument is scuttled by our assignment of no credibility to its expert, Mr. Tapp. Mr. Tapp exhibited that he had been unaware at the time he performed his economic benefit analysis that Sunoco was in fact required, per the terms of the 1995 Plan Approval and Compliance Permit, to install ULNB on the two boilers by June 1996, as opposed to the SPUD burners and LNB that were ultimately installed. Instead, he had assumed, and based his analysis on, the mistaken assumption of Sunoco installing the same equipment in 1996 that it ultimately installed on the boilers in 1998 and 2001. It is beyond dispute now that this factor is a fundamental input to the BEN Model analysis and that Mr. Tapp had it wrong. Even Mr. Tapp had an understanding of the importance of the information that he did not possess to the operation of the BEN Model.[25]

Cross-examination showed that as of the date of his March 17, 2003 expert report, and even as of his April 22, 2003 deposition, Mr. Tapp did not know that the 1995 Plan Approval and Compliance Permit required UNLB on both boilers. He had assumed, quite incorrectly, that LNB were to be used on Boiler No. 6 and SPUD burners on Boiler No. 7. Mr. Tapp persisted, even at trial, in maintaining that the best evidence of what Sunoco would have been done for RACT in 1996 is what Sunoco eventually did for RACT later in 1998 and 2001. That plainly and obviously contradicts what actually happened at Sunoco's refinery. Sunoco was obligated in 1996 to be in compliance to have installed UNLB on the two boilers. What Sunoco eventually did years later (LNB on Boiler No. 6 and SPUDs on Boiler No. 7) was the result of later negotiations and, as far as SPUD burners are concerned, later technology which was not even available in 1996. Mr. Tapp showed that he was not aware that SPUD burners were not available

[25] Tr. 1043; Ex. 33 p. 45-46. *See also* Ex. C-27 p. 3-21.

in June of 1996 and that his own client, Sunoco, had never even heard of SPUD burners or thought about their use on Boiler No. 7 until May, 1996.[26]

From Mr. Mr. Tapp's trial testimony, especially the first round of cross-examination, it was apparent that his deposition was somewhat of a revelatory experience for him as that was the first inkling to him that he had important assumptions wrong. A telling piece of testimony was Mr. Tapp's confession during cross-examination that after his deposition, "I went back to my client to get a better understanding of the RACT regulations to make sure I had the 'story straight.'" Tr. 1038. He also admitted that he was, "willfully inept in knowing what was low NOx versus ultra low NOx RACT regulations." Tr. 1071.

Mr. Tapp also exhibited a pattern of evasiveness about his error. His evasiveness is exemplified in the following interchange:

> Q. In fact, when you wrote this report, you thought it was a matter of understanding or a matter of record, that it was the same type of burners required in 1996, as were installed in '98 and 2001 didn't you?
>
> A. I don't know.

Tr. 1036.[27] It was only after Mr. Tapp's second round of cross-examination was over, upon questioning by the trial judge, that Mr. Tapp clearly admitted that he had been unaware that the

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[26] Mr. Tapp's trial cross-examination at Tr. 1029-1062 coupled with the text of the expert report (Ex. A-39) and Mr. Tapp's deposition (Ex. A-33) are particularly revealing on the subjects addressed in this paragraph. Mr. Tapp's March 17, 2003 Expert Report (Ex. A-39) states that, "[t]he [DEP] contends that those burners should have been installed on May 31, 1996 and that Sunoco benefited from this delay". Ex. A-39 p. 1-2. By reference to "those burners" he clearly meant the burners the Sunoco eventually did install in 1998 and 2001, *i.e.*, LNB on Boiler No. 6 and SPUD burners on Boiler No. 7. In his deposition, Mr. Tapp stated that he understood that the on-time scenario, what Sunoco would have installed for RACT in 1996 was "six ultra low NOx and seven spud". Ex. A-33 p. 48-49. There, he may have the ULNB part correct but not the SPUD part. At trial, even of direct examination, he showed that he was unknowledgeable or very confused about the underlying facts regarding what RACT technology was required to have been installed in 1996. *See, e.g.*, Tr. 983-84. He revealed to us that he was an expert witness who was hazy and confused about important facts relating to his expert opinion. *See* Ex. C-10 for the first note, dated May 20, 1996, from Sunoco mentioning the possible use of SPUD burners on Boiler No. 7. The first time Sunoco proposed to DEP to use SPUDs on Boiler No. 7 was in its May 29, 1996 RACT analysis revision for Boiler No. 7. Ex. A-14.

[27] See Tr. 1033-40 for the particular instance of a pattern of evasiveness and defensiveness on the part of

1995 Plan Approval and Compliance Permit required the installation of RACT technology on both Boiler No. 6 and Boiler No. 7 different from what Sunoco eventually installed in 1998 and 2001 on those two boilers.[28]

We conclude based upon review of the expert report, the deposition transcript and hearing Mr. Tapp on the witness stand directly that, from the outset, he had his facts wrong, the facts he had wrong were important ones, and this seriously damages his believability. We also conclude that he was evasive in dealing with that problem which also diminishes our inclination and/or ability to credit his testimony in this particular case.

Aside from Mr. Tapp's lack of knowledge about the important facts we have discussed, we credit Mr. Bixby's testimony that the on-time cost estimate which should be used for the BEN Model input in this case is the cost Sunoco would have incurred had it complied in installing ULNB on Boiler No. 6 on-time pursuant to the 1995 Plan Approval and Compliance Permit and that the correct number is the one Sunoco itself provided twice to the Department in its July, 1994 and September, 1994 RACT proposals, *i.e.*, $1,550,504.[29] Mr. Bixby's opinion is well supported by the BEN Model itself. The portion of the BEN Model Mr. Bixby relied upon for this part of his analysis describes when it is appropriate to use separate cost estimates for non-compliance and compliance dates. Mr. Bixby credibly explained why in this case one would do so.[30]

Besides being a flawed approach under the confines of the BEN Model, Mr. Tapp's approach is contrary to common sense. As an example, say a person, we will call him Driver, is

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Mr. Tapp.

[28] See Tr. 1070-1075, particularly Tr. 1075.

[29] Tr. 479-83; Ex. C-27 p. 3-21. The referenced RACT proposals are Ex. A-3 p. 3-26-27; Ex. A-4 Bates p. No. 44263.

[30] Tr. 479-83; Ex. C-27 p. 3-21.

required by law to buy a seatbelt for installation into his automobile in Year 1 to satisfy a law requiring cars be equipped with Reasonably Available Safety Technology (RAST). He fails to do so and is in non-compliance. The driver continues in violation through Year 3 at which time air-bag devices are invented. In Year 4 he secures the government's approval to install air-bags to satisfy the RAST requirements. It would be plainly illogical in that scenario to say that the best evidence of what Driver would have spent to comply in Year 1 is what he spent on air-bags in Year 4. Air-bags were not even invented until Year 3 and were thus unavailable in Year 1. In such a scenario, the estimated cost of seatbelts installed in Year 1 is the best evidence of what Driver would have spent in Year 1 to comply, not what Driver eventually spent on air-bags in Year 4. This case is not unlike the hypothetical. Here, we know precisely what Sunoco was required to do by the unappealed 1995 Plan Approval and Compliance Permit to comply: install ULNB on both Boiler 6 and Boiler 7. It eventually installed LNB on Boiler 6 in 2001 and, in 1998, it installed SPUD burners, which were not even available in 1995, on Boiler No. 7. As Mr. Bixby explained credibly, the BEN Model accounts for this scenario and he applied that aspect of the BEN Model properly to account for that situation here.

Mr. Tapp's insistence through his deposition and trial testimony that the best evidence for use in the BEN Model for what Sunoco would have spent is what it did spend later for different RACT technology was, we think, a position Mr. Tapp was forced to maintain once he realized his mistake and he either could not or would not backtrack. That resulted in Mr. Tapp's being wed to using an incorrect input to the BEN Model. We reject his use of the improper input into the BEN Model.

Given the correctness of using the different cost estimates for non-compliance and compliance dates, Sunoco then attacks the accuracy of the on-time compliance capital

investment cost estimate of $1,550,504 that Mr. Bixby used in his analysis.[31] That number, though, is the cost for ULNB provided by Sunoco in its July, 1994 RACT plan approval application and again in September, 1994.[32] Sunoco contends that the cost estimate is too high and inaccurate. Sunoco still maintains that the number, although contained in its submission to DEP, was based on an incorrect number of burners for Boiler No. 6, that the estimate was a "high level" and "not very precise," and it included an alleged $300,000 "contingency" which would not have actually been spent.

For DEP to have used the number provided twice by Sunoco itself as the estimated cost for ULNB in DEP's penalty calculation as the cost of ULNB burners which Sunoco would have incurred had it complied is not unreasonable. That number, by the way, is the only cost estimate for ULNB anywhere in the record. Sunoco did not prove that the cost estimate for ULNB contained in its July 1994 RACT Proposal, and repeated in its September 1994 RACT Proposal, was inaccurate or erroneous and it offered no alternative number for the cost of ULNB. We will not disturb that input to the BEN Model now.

Second, Sunoco relies on Mr. Tapp to attack the use of the estimate. Mr. Tapp is the one who testified that estimate was of a "high level" and that it "is not very precise".[33] We reject Mr. Tapp's testimony on this as being not credible. Mr. Tapp's testimony, to the extent it can be characterized as expert opinion, is infected with the same fundamental shortcoming that we described before regarding Mr. Tapp's testimony. Mr. Tapp maintained that the use of the $1,550,504 on-time cost estimate was not right based on his insistence that the best measure of

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[31] Ex. C-31, p. 1.

[32] Ex. C-31; Ex. A-3 p. 3-26-27; Ex. A-4 Bates p. No. 44263.

[33] Tr. 1013.

the on-time cost scenario is what the company eventually did.[34] We have already demonstrated that this view does not comport with the facts of this case, the BEN Model or common sense.

Moreover, much of the testimony about the estimate was based Ex. A-47, a document that was not admitted for the truth of the data contained therein. That document bears the label of Bechtel Corporation and appears to have been prepared by Bechtel for Sunoco. The date of the document is July, 1994. That date does coincide with the time that Sunoco was in the process of preparing RACT proposals with cost estimates that were submitted to DEP. However, the document was not properly authenticated and nobody from Bechtel or Sunoco for that matter was presented to testify about how the document came to be created. Thus, it was not admitted for the truth of any data contained therein.[35]

In addition, Mr. Tapp did not show that he knew anything about the origin or the derivation of the $1,550,504 cost estimate which he attempted to criticize at trial as being of a "high level" and "not very precise". Finally, the quality or lack thereof of estimates of the cost of air pollution control hardware is not within Mr. Tapp's expert purview anyway. Thus, he has no expert standing to criticize the quality of any estimate, let alone one that had been provided twice by his own client.

On the supposed $300,000 "contingency" in the Sunoco estimate, there was no admissible documentary evidence on that subject and what Mr. Tapp had to say about that is not credible. It is, again, A-47 which is the only document Sunoco can reference that supposedly relates to a "contingency" built into the cost estimate Sunoco submitted to DEP. That document does appear to reference a contingency dollar amount associated with a cost estimate for control equipment on Boiler No. 6. However, as we said before, that is not admissible evidence for the

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[34] Tr. 978-83, 1018-19; Ex. A-39 p. 11.

[35] Tr. 584-86, 1004-05

truth of any assertion relating to a supposed contingency. Mr. Tapp's reference in testimony to a $300,000 contingency as being a contingency which was not real or actual costs to Sunoco is totally incredible for the reasons we discussed above.[36]

We credit the other aspects of Mr. Bixby's use of the BEN Model as being correct such as his application of the tax rate and discount rate. Thus, we credit Mr. Bixby's opinion that Sunoco reaped an economic benefit of $1,391,260 in connection with its non-compliance as to Boiler No. 6. We, of course, reject Mr. Tapp's opinion that the economic benefit figure for non-compliance related to Boiler No. 6 was $521,704.

We turn very briefly to Boiler No. 7. As we said, the Department did not assess a penalty component for economic benefit for the non-compliance related to that Boiler. Sunoco, however, through Mr. Tapp, attempted to suggest that Sunoco actually suffered an economic detriment due to its delay in compliance. Sunoco argues that the BEN Model supports offsetting that supposed detriment against the economic benefit associated with non-compliance as to Boiler No. 6. Whether the BEN Model does so or not is beside the point since we reject the testimony of Mr. Tapp on this subject as well. For many of the reasons already stated we credit the testimony of Mr. Bixby that, contrary to Sunoco having suffered an economic detriment from non-compliance, it enjoyed an economic benefit relating to its non-compliance with respect to Boiler No. 7 in that amount of $1,540,927.

We are not going to visit upon Sunoco a penalty corresponding to economic benefit from non-compliance as to Boiler No. 7 that the Department did not assess. However, we do note that Sunoco has benefited from the Department's forbearance in assessing a penalty as to Boiler No.

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[36] These references by Mr.Tapp came at Tr. 1014-15. Thus, DEP's statement in its Post-Hearing Reply Brief at page 7-8 that there is no testimonial evidence about the supposed "contingency" is not quite correct. There is testimonial evidence but; (1) it is based on Ex. A-47, a document which was not admitted for the truth of any of the numerical figures in the document; and (2) the testimony is not credible in any event.

7. Also, while we conclude that separate and apart from its forbearance in assessing a penalty component for economic benefit rendered by non-compliance as to Boiler No. 7 the Department's penalty calculation in this case was appropriate, the benefit to Sunoco of having had a "pass" as to Boiler No. 7 certainly renders the final number that DEP assessed here for the penalty as a whole quite fair, if not generous.

III. Conclusion

We think that the Department properly applied the statutory factors of the APCA to the circumstances of this case and that the total amount of the Penalty assessed is both reasonable and appropriate. We do not find any of Sunoco's assignments of error to the Department as meritorious or credible.

CONCLUSIONS OF LAW

1. The Board reviews all DEP final actions *de novo*.

2. DEP bears the burden of proof with respect to the civil penalty assessed against Sunoco. To carry its burden, DEP must prove by a preponderance that: the underlying violations of law giving rise to the assessment in fact occurred; the penalty imposed is lawful; and, the penalty is reasonable and appropriate.

3. In reviewing the penalty calculation, the Board ascertains whether DEP properly applied the statutory penalty-assessment criteria to the facts of the case, and whether the penalty amount is reasonable and appropriate for the violations and surrounding circumstances.

4. Appellant stipulated as to its liability for the violations underlying the civil penalty assessment.

5. DEP was authorized to assess a penalty for the violations of the APCA committed by Appellant and the amount of the Penalty was within the statutory limits under the APCA.

6. Based upon the evidence at the hearing, as considered in light of the statutory

factors required to be considered in establishing a penalty assessment amount pursuant to the APCA, DEP's assessment of a civil penalty against Sunoco for its violations of the APCA in the total amount of $3,465,660.00 was a proper application of the APCA and was reasonable and appropriate for the circumstances of this case.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SUNOCO, INC. (R & M)	:	
	:	
v.	:	**EHB Docket No. 2002-268-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 12, 2004**

O R D E R

And now this 12th day of April 2004 it is hereby ORDERED as follows:

1. The appeal of Sunoco, Inc. (R&M) docketed at EHB Docket. No. 2002-268-K of the Department's assessment of a civil penalty in the amount of $3,465,660 is hereby dismissed, and the docket shall be marked closed and discontinued.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
Member

Dated: April 12, 2004

cc: **DEP Bureau of Litigation**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DELAWARE RIVERKEEPER, DELAWARE RIVERKEEPER NETWORK AND AMERICAN LITTORAL SOCIETY	:	
v.	:	**HB Docket No. 2003-083-MG (consolidated with 2003-229-MG)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PORTLAND BOROUGH, Permittee	:	**Issued:** April 15, 2004

OPINION AND ORDER ON PORTLAND BOROUGH'S MOTION *IN LIMINE*

By George J. Miller, Administrative Law Judge

Synopsis

A permittee's motion *in limine* to preclude testimony on issues not properly raised by a notice of appeal from the Department's approval of a sewage facilities plan is granted only in part because some of the testimony may be relevant to issues raised by a notice of appeal as amended from the related issuance of an NPDES permit for the proposed municipal treatment works. The motion to preclude testimony with respect to indirect environmental effects on an adjoining township is denied where the Appellants' claim is that the sewage facilities plan improperly reserves capacity for the adjoining township that has not yet amended its sewage facilities plan from one providing only for on-site disposal.

Background

These are appeals from the approval by the Department of Environmental Protection's (Department) of the Sewage Facilities Plan of Portland Borough (the Plan or Act 537 Plan) and the issuance by the Department of an NPDES permit for the discharge of wastewater from the proposed sewage treatment works. The hearing on the merits on these appeals is scheduled to commence on April 20, 2004.

On March 30, 2004 Portland Borough filed a motion *in limine* seeking an order striking certain factual and legal issues described in the Appellants' pre-hearing memoranda based on the failure to raise these issues in the original or amended notices of appeal. In addition, the motion seeks an order prohibiting the introduction of certain expert testimony concerning indirect environmental effects of the project based on previous decisions of the Commonwealth Court that may be interpreted to mean that the Board has no jurisdiction to consider the impacts of these effects because they involve land planning decisions that should be made by municipal authorities.

The Appellants' initial notice of appeal filed on April 3, 2003, from the Department's approval of the Plan on March 4, 2003, claimed only that the Department failed to consider alternatives to the discharge from the approved facility to the Delaware River, which discharge would impact "the aesthetic, recreational, ecological, environmental and commercial qualities of the Delaware River."

The initial notice of appeal from the issuance of the NPDES permit issued on July 22, 2003 was filed on September 15, 2003. This notice of appeal raised this same objection and an additional objection that the permit limits in the permit for certain pollutants exceeded those provided in the Plan for this same discharge.

Promptly thereafter, on September 30, 2003 Appellants effectively amended their notice of appeal from the Department's issuance of the NPDES permit by filing an amended notice of appeal as of right.[1] This amendment added the following objections to the appeal from the issuance of the NPDES permit:

A. The Department's approval of the NPDES permit will have adverse effects [on Appellants] in that the NPDES permit provides for discharges into the Delaware River that will degrade water quality. This stream discharge will impact the aesthetic, recreational, ecological, environmental and commercial qualities of the Delaware River.

B. DEP committed an error of law and acted arbitrarily, capriciously and/or unreasonably in the approval of the NPDES permit because the permit provides for 105,000 gpd discharge (.105 mgd) which exceeds the needs of Portland Borough.

C. DEP committed an error of law and acted arbitrarily, capriciously and/or unreasonably in the approval of the NPDES permit because it did not have sufficient information upon which to determine the immediate and long range impact upon the Commonwealth pursuant to 35 P.S. § 691.5.

D. DEP committed an error of law and acted arbitrarily, capriciously and/or unreasonably in the approval of the NPDES permit because it lacked sufficient information on potential or alleged industrial dischargers, failed to describe the nature of the waste to be received by the STP and/or whether there would be pre-treatment sufficient to meet water quality requirements of the Delaware River pursuant to 25 Pa. Code § 93.

E. DEP committed an error of law and acted arbitrarily, capriciously and/or unreasonably in the approval of the NPDES permit because it failed to consider the social and economic impact on downstream users of the Delaware River.

F. DEP committed an error of law and acted arbitrarily, capriciously and/or unreasonably in the approval of the NPDES permit because it failed to consider alternatives to the stream discharge.

G. DEP committed an error of law and acted arbitrarily, capriciously and/or unreasonably in the approval of the NPDES permit because the discharge will impact Pennsylvania and/or Federally listed endangered or threatened species.

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[1] The Board's Rules of Practice and Procedure at 25 Pa. Code § 1021.53(a) permit an amendment as of right by filing an amended appeal within 20 days of the filing of the original notice of appeal.

H. DEP committed an error of law and acted arbitrarily, capriciously and/or unreasonably in the approval of the NPDES permit because it failed to require an Environmental Impact Statement pursuant to NEPA, failed to insure adequate protection of a National Scenic River, and failed to require adequate protection to the Delaware River which is in the process of obtaining special protection status from the Delaware River Basin Commission.

I. DEP committed an error of law and acted arbitrarily, capriciously and/or unreasonably in the approval of the NPDES permit by failing to determine that the public benefits do not outweigh the environmental harms to the natural, scenic, historic and aesthetic values of the environment, the streams, the wildlife and the wildlife habitat. 25 Pa. Code Section 105.15, 105.16.

J. DEP committed an error of law and acted arbitrarily, capriciously and/or unreasonably in the approval of the NPDES permit by failing to determine whether there are other alternatives to the proposed discharge and the discharge will degrade the quality of life for the public. 25 Pa. Code Section 105.15, 105.16, 105.17, 105.18.

K. DEP committed an error of law and acted arbitrarily, capriciously and/or unreasonably in the approval of the NPDES permit by failing to require compliance with all applicable statutes and regulations mandated for the protection of the Commonwealth's natural resources pursuant to Article 1, Section 27 of the Pennsylvania Constitution.

The Appellants also proposed amendments to the notice of appeal from the Department's approval of the Plan. These proposed amendments, filed on August 8 and on September 30, 2003, raised many additional objections to the plan approval. Portland Borough opposed Appellants' motions to amend their notice of appeal from the approval of the Plan, based in part on the representations that it has very limited financial resources and that it must incur expenses for the construction of the treatment works by the end of December 2004 to assure that it will receive grant money necessary to construct the proposed treatment works.[2]

The Board partially granted the motions to amend and permitted amendments to the notices of appeal to add claims that the proposed facility is the best environmentally acceptable

[2] The grant agreement dated May 20, 2002 provides that the grant of $3,231,225, to be funded by a bond issuance, must be used within three years or by May 19, 2005 absent an extension agreement.

alternative, that the facility provides for more than two times the capacity required by Portland Borough without properly evaluating alternatives, and that the Plan did not advance the policies of the Sewage Facilities Act and the Clean Streams Law. The Board also permitted amendments relating to the claimed impropriety of approving the Plan because it approved the treatment of capacity reserved for Upper Mount Bethel Township without requiring the approval of a sewage facilities plan from that township.[3]

However, the Board's orders denied proposed amendments to the Plan appeal relating to endangered species and wetlands, a general claim that the Plan application did not meet many of the Department's requirements as to content, the absence of requirements for industrial pretreatment and the possible addition of industrial users of the facility, as well as the failure to consider land use planning matters. This action was taken because these objections were not included in or reasonably related to the objections in the original notice of appeal from approval of the plan. Appellants should have been aware of the facts on which these proposed amendments were based with the exercise of reasonable diligence well before the amendments were proposed so that the requirements for amending a notice of appeal set forth in the Board's Rules of Procedure[4] could not be met. In addition, permitting the pursuit of these claims as to the approval of the Plan clearly would have required additional and extended factual discovery that would delay a prompt hearing on the merits of the substantial claims of the parties. Such a course might defeat the financing of the project, apparently needed to solve significant pollution

[3] Opinion and Order dated September 12, 2003 and Order issued on December 23, 2003.
[4] 25 Pa. Code § 1021.53.

problems in the Portland community, solely because of the passage of the time required for discovery of comparatively peripheral issues.[5]

The motion *in limine* challenges statements in the Appellants' pre-hearing memorandum raising factual or legal issues not contained in the original notices of appeal or not authorized by the Board by amendment to the notices of appeal. These statements relate, among other things to the Department's detailed regulations relating to plan application content, flood plains, user fees, land use considerations and a possible violation of Article I, section 27 of the Pennsylvania Constitution as applied to the approval of the Plan.

The Appellants' response to the motion seeks denial of the motion in its entirety. Appellants claim that because the Board consolidated these appeals in response to their motion for consolidation all of the objections made as to the issuance of the NPDES permit are also applicable to the plan approval and because the NPDES permit issuance is dependant on the propriety of the Department's approval of the plan. We reject these contentions. In our view, these cases were consolidated only for the hearing on objections to the appeals and that the availability of any objection to the Plan must stand on whether it was made in the notice of appeal from approval of the Plan or approved by the Board as an amendment to the notice of appeal from the Department's approval of the Plan. Furthermore, the citation of the regulation concerning the content of plans[6] in support of the Appellants Objection D of the Plan appeal, relating to excess capacity, does not preserve all matters relating to that regulation. Accordingly, to the extent the Appellants' pre-hearing memorandum seeks to advance claims relating to the

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[5] To assure that the merits of these appeals can be heard promptly and an adjudication issued by the Board before the end of the year, the Board has encouraged the prompt completion of pre-hearing proceedings and has denied some of the Appellants' requests to amend the notices of appeal to avoid extended discovery that would delay the resolution of these appeals unnecessarily.

[6] 25 Pa. Code § 71.21.

content of the plan application, likely user fees, land planning and public notification matters, the motion *in limine* will be granted as set forth in the attached order.

The motion will be denied at this time, however, with respect to statements in the Appellants' pre-hearing memorandum that are likely to be relevant to claims made in the notices of appeal from approval of the NPDES permit or as in amendments to those notices of appeal as approved by the Board. As set forth in the attached order, these include minimization of environmental harms, the claim that the permit is based on a plan that improperly provides for excess capacity for Upper Mount Bethel Township and inadequately considers alternatives, pretreatment concerns and possible use of the facilities by unknown large industrial operations, as well as protection to the Delaware River.

Paragraph 72 of Part 1.A of the Appellants' memorandum is a more difficult hair to split. That paragraph challenges the NPDES permit to the extent to which it is based upon an incomplete Act 537 plan application:

> Portland Borough's NPDES permit is based upon an Act 537 Plan approval of a regional alternative that does not evaluate regional zoning, land use, environmental features, wetlands, soils and other natural features required to determine if the alternative selected reduced environmental incursion to a minimum.

The Appellants argue that this falls within the purview of Objection K of the NPDES appeal which claims that the approval of the NPDES permit was in error because the Department failed to require compliance with all applicable statutes and regulations. Although on its face, Paragraph 72 appears to fall within the ambit of Objection K, it can not be viewed in a vacuum. As we explained above, the Appellants did not preserve the claim that the Act 537 application was incomplete as it related to zoning, land use, etc. We can not allow the Appellants to raise the

argument collaterally in the NPDES appeal which we explicitly disallowed to be raised directly in the Act 537 appeal. Therefore we must strike Paragraph 72.

The motion also seeks to bar at the hearing the testimony of an expert, Thomas Cahill, with respect to likely secondary and indirect environmental effects of the project. This expert's report sets forth an opinion that "excess capacity" of the proposed treatment plant will result in undesirable land use development that may also result in various types of impacts on wetlands and other environmentally sensitive areas. Portland Borough argues that under previous decisions of the Commonwealth Court and of the Board the Department has no duty to consider these indirect impacts and the Board has no jurisdiction to consider them in reviewing the Department's action.[7]

The Board's previous opinion and order relating to amendments to the notice of appeal from the Department's approval of the Plan[8] specifically permitted a claim that the approval of the Plan was improper because the plan requires more than two times the capacity required by Portland Borough to meet its needs, and that the Plan does not include the development and evaluation of alternatives to a stream discharge for the excess capacity in violation of 25 Pa. Code § 71.21(a), § 71.21(a)(6) and § 71.31(a). The Board's order of December 23, 2003 also permitted amendments to the notices of appeal claiming that the approval of the Plan was improper because the Plan authorizes sufficient capacity for sewage service to Upper Mount Bethel Township without requiring the adoption of a sewage facilities plan by that township.

As we understand Mr. Cahill's proposed testimony, he believes that the capacity reserved for Upper Mount Bethel Township is clearly more than Portland Borough requires for its own

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[7] *See, for example, Community College of Delaware County v. Fox*, 342 A.2d 468 (Pa. Cmwlth. 1975); *Oley Township v. Department of Environmental Protection*, 710 A.2d 1228 (Pa. Cmwlth. 1998).

[8] Opinion and Order dated September 12, 2003.

needs and that it is this provision for excess capacity that will result in a marketing of this treatment capacity to unknown users in Upper Mount Bethel Township and the undesirable environmental results as described in his report.

We will deny the motion to bar Mr. Cahill's testimony at this time because it appears that it may very well be relevant to the claim that the Department improperly approved excess capacity for Upper Mount Bethel Township when that municipality had not revised its sewage facilities plan from one calling solely for on-lot facilities. The Sewage Facilities Act may not ordinarily be interpreted to permit the Department or the Board to consider indirect environmental impacts relating to land use, an area ordinarily reserved for municipal planners. However, the Appellants' claim in this case appears to be that the Department acted without permitting or requiring Upper Mount Bethel Township to exercise its planning function. If we understand Mr. Cahill's report correctly, he believes that this reservation of capacity for Upper Mount Bethel Township will result in adverse environmental consequences for that Township that should be considered by that Township prior to the Department's approval of the Plan.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DELAWARE RIVERKEEPER, DELAWARE RIVERKEEPER NETWORK AND AMERICAN LITTORAL SOCIETY	:	
v.	:	**EHB Docket No. 2003-083-MG (consolidated with 2003-229-MG)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PORTLAND BOROUGH, Permittee	:	

ORDER ON PORTLAND BOROUGH'S MOTION IN LIMINE

AND NOW, this 15th day of April, 2004, in consideration of the Motion *in Limine* filed by Portland Borough and the response of the Appellants and the Department thereto, IT IS HEREBY ORDERED as follows:

1. The motion *in limine* is **GRANTED** to the extent that the following portions of Appellants' Prehearing Memorandum are stricken as being outside the objections set forth in the notice of appeal from the Plan approval, as amended:

   Part I.A. Facts in dispute: ¶ ¶ 12, 17, 18 (incomplete needs analysis); ¶ 19 (incorrect identification of wetlands); ¶¶ 20, 21(failure to consider and incorrect mapping of existing sewage facilities); ¶ 22 (incorrect designation of existing land use and plans); ¶ 72.

   Part I.B. Facts Upon Which the Parties Agree:

   ¶¶ 71, 72 (publication of notice)

   Part II Legal Issues in Dispute:

   ¶ 31 (reduce incursions to the environment as it relates to Act 537 appeal); ¶ 35 (permit application not adequate or complete); ¶ 37 (land planning and notice of application); ¶ 38.c.1 to c.3 (detailed contents of application); ¶ 40 (violation of Constitution as applied to Act 537 plan except as provided below)

2. To the extent that Part 1. A. ¶¶ 45-48 (balancing of harms and benefits as applied to Act 537 Plan Approval); ¶ 57 (pump station located in flood plain); ¶ 66 (failure to consider possible user fees); and ¶ 74 (pump station in flood plain) and Part 2. ¶ 40

f. relate to the Act 537 Plan, the motion is **GRANTED**. To the extent that those paragraphs raise objections to the NPDES permit, the motion is **DENIED.**

3. The motion is **DENIED** with respect to the following:

   Part I.A. Facts in dispute: ¶ 42 (no assurance of pretreatment); ¶ 53 (capacity a magnet for large sewage producer); ¶ 57 (minimization of harms as required by the Department's regulations under the Clean Streams Law); ¶ 71 (permit based on plan that exceeds Borough's needs and jurisdiction); ¶ 74 (permit based on plan approved without proper alternatives analysis); ¶ 87 (harm to the environment and natural resources but only to the extent of the Delaware River)

   Part I.B. Facts upon which the parties agree: ¶ 64 (no industrial discharge)

   Part II Legal Issues in Dispute: ¶ 31 (reduce incursions to the environment as it relates to the NPDES appeal); ¶ 35 (need for UMBT resolution); ¶ 40 e. (reduction of environmental harms to the extent relevant to the NPDES permit); ¶ 40 f. (environmental harm to wildlife and natural resources) ¶ 48 (industrial users and pretreatment to the extent relevant to the NPDES permit; ¶ 48.a. (protection of Delaware River and anti-degradation requirements).

4. The motion to preclude the testimony of Thomas Cahill and Associates on pages 16 and 18 discussing indirect or secondary impacts of the proposed facilities, including impacts of land development in Portland Borough and Upper Mount Bethel Township, is **DENIED**.

5. At the hearing on the merits the Appellants may not introduce evidence in support of claims not raised in the notices of appeal, as amended, or in support of statements in the Appellants' pre-hearing memorandum that are the subject of paragraphs 1 and 2 of this order.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Member

DATED: April 15, 2004

See following page for service list.

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

FRANK ROBINSON and JOHN ROBINSON	:	
v.	:	**EHB Docket No. 2004-072-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOL PENNSYLVANIA COAL COMPANY, Permittee	:	**Issued: April 15, 2004**

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

A petition for supersedeas is denied where the appellants have not demonstrated a likelihood of success on the merits or irreparable harm and where there is a likelihood of injury to the public if the supersedeas is granted. Where the appellants are not lawfully authorized to operate the gas well that is the subject of this appeal, they have not demonstrated a likelihood of success on the merits. Secondly, continued operation of the gas well in its current condition creates a likelihood of injury to the public.

OPINION

Frank Robinson and John Robinson (the Robinsons) appeal an order of the Department of Environmental Protection (Department) authorizing Consol Pennsylvania Coal Company

(Consol) to replug gas well 4693, located on the Robinson's property in Richhill Township, Greene County. The Robinsons contend they are the owners of the oil and gas beneath their property and that they have returned gas well 4693 to production.

The Robinsons filed a petition for supersedeas, and a hearing on their petition was held on March 30, 2004. The facts are as follows. Gas well 4693 was drilled in 1912 and plugged and abandoned in 1970. The Robinsons, ***sans*** permit, attached hoses and pipes to the vent pipe and were able to use the gas to supply fuel to a small stove in a small hut near the well. Mr. Frank Robinson testified that the well could provide pipline quality gas at a rate of 2800 cubic feet per day which he contends will provide sufficient gas for the residence on the property as well as provide excess gas which could be sold or used for other purposes. Although the Robinsons filed a well registration form seeking to register gas well 4693, their registration check was returned by the Department. According to the testimony of the Department's Oil and Gas Regional Manager, Mr. David Janco, the well can be registered only if it is permitted and brought into compliance with the applicable standards.

Consol owns the coal rights beneath the Robinson property and has initiated longwall mining in this area. In order to mine through the area where the gas well is located, they must replug the well. On or about October 16, 2003, Consol filed a notice of intent to plug the well. On November 10, 2003, the Robinsons filed an objection to the notice of intent to plug. Mr. Janco reviewed the objection of the Robinsons and determined it had no merit. After seeking additional information from Consol regarding their ownership of the mineral rights, the Department ultimately granted Consol's application to replug the well.

In determining whether to grant or deny a supersedeas, the Board shall consider the following factors:

1) Irreparable harm to the petitioner.

2) The likelihood of the petitioner prevailing on the merits.

3) The likelihood of injury to the public or other parties, such as the permittee in third party appeals.

25 Pa. Code § 1021.63(a). A supersedeas will not be issued in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect. 25 Pa. Code § 1021.63(b).

Section 13(c) of the Coal and Gas Resource Coordination Act states in relevant part as follows:

> If no objection to the plugging or replugging of such well is filed by any such landowner, lessor or lessee within 30 days after the filing of the application. . . then the applicant may proceed with the cleaning out, plugging or replugging.

58 P.S. § 513(c). We agree with the Department's interpretation of this provision. If no objection is filed within 30 days, then the applicant may proceed with cleaning and plugging or replugging the gas well. However, if an objection is received, the Department must consider and evaluate it before allowing the applicant to proceed. In this case, the Department considered the Robinsons' objection to the application for replugging. They determined that the Robinsons do not have a permit to operate gas well 4693, nor any authorization to operate the well. Upon learning of the Robinsons' activities with regard to well 4693, the Department advised them that their activities were unsafe and unlawful and requested them to discontinue their activities which they did.

In addition, according to the Department, the Robinsons' operation of the well in its current state has created a potentially hazardous condition. The Department contends that if gas is migrating into the plugged well bore and traveling through the vent pipe to the surface, closing

the vent and containing the gas creates back pressure and increases the potential for gas to migrate into the coal seam, local aquifers and nearby structures, creating a danger of explosion or fire.

Finally, based on the testimony at hearing, we find that Consol properly applied for the replugging of gas well 4693. The Robinsons have not demonstrated otherwise.

Therefore, we find that the Robinsons have not met their burden for obtaining a supersedeas. Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRANK ROBINSON AND JOHN ROBINSON	:	
v.	:	**EHB Docket No. 2004-072-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOL PENNSYLVANIA COAL COMPANY, Permittee	:	

ORDER

AND NOW, this 15th day of April, 2004, the Robinsons' Petition for Supersedeas is ***denied***. The temporary supersedeas ***granted*** on March 30, 2004 and extended on April 7, 2004, is hereby lifted.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administration Law Judge
Member

DATE: April 15, 2004

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c: **DEP Bureau of Litigation:**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ROBERT BARRA and ROBERT AINBINDER	:	
v.	:	**EHB Docket No. 2003-038-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 16, 2004**

OPINION AND ORDER DENYING A MOTION TO DISMISS

By: Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Department's motion to dismiss, contending lack of jurisdiction because the appeal was allegedly untimely filed, is denied. The Appellants, two individuals, filed their notice of appeal within thirty days of receiving actual notice of the Department's final action under appeal.

Factual Background

This matter involves a third-party appeal by two individuals, Robert Ainbinder and Robert Barra, from a letter issued by the Department of Environmental Protection (DEP) to Bernice Mining and Contracting, Inc. (Bernice) declaring a forfeiture of certain collateral bonds pursuant to the Surface Mining Conservation and Reclamation Act (SMCRA).[1] DEP has filed a motion to dismiss contending that the Board lacks jurisdiction over this appeal because the Notice of Appeal filed by Messrs. Barra and Ainbinder was untimely.[2] Appellants oppose the

[1] Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. § 1396.1 *et seq.*

[2] DEP's motion is supported by an affidavit of Terry L. Confer, Manager of the Mining District Monitoring and Compliance Section in DEP's Moshannon District Office, an affidavit of William S. Allen, Jr., Chief, Compliance Section in DEP's Bureau of Mining and Reclamation, as well as various exhibits accompanying the two affidavits.

motion, arguing that they filed their appeal in accordance with Board regulations—that is, within thirty days of receiving actual notice of the contested DEP action.[3]

The underlying subject of this appeal is Bernice's mining operation in Cherry Township, Sullivan County, permitted at SMP No. 57813001 (the Bliss Site). The Bliss Site appears to have a rather complex history, much of which is both unclear and irrelevant for resolution of the specific question presented by this motion. Over the past several years, various entities have been involved in some way with the Bliss Site, although the nature of the relationships and the precise interests of the various persons is sketchy at this point. Certain facts material to resolution of DEPs' motion are discernible, however, from the motion papers.

The permittee, Bernice, posted seven collateral and surety bonds for the Bliss Site mining operation in an amount totaling approximately $260,000. These bonds guarantee Bernice's performance of its obligation to properly reclaim the Bliss Site; in the event Bernice fails to perform, DEP may use funds collected from bond forfeiture to complete the reclamation of the site. *See* 25 Pa. Code § 86.182. Based on a history of alleged violations of the SMCRA and its implementing regulations, DEP issued a letter to Bernice, dated December 18, 2002, declaring forfeit in the full amount the collateral bonds posted by Bernice for the Bliss Site.[4] The December 18, 2002 forfeiture letter (the Forfeiture Declaration) is the subject of this third-party appeal filed by Messrs. Ainbinder and Barra.

Notice of the Forfeiture Declaration to Permittee and Sureties

According to surface mining regulations, DEP will send written notification by mail of a bond forfeiture declaration to the permittee and the surety on the bond, and advise them of their

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[3] Appellants supported their opposition with an Affirmation of Robert Ainbinder and numerous attached exhibits.

[4] *See* Affidavit of Terry L. Confer, at ¶ 2 and Exh. A; Notice of Appeal, at ¶ 2 and attached exhibit. As part of its motion, DEP recites some of Bernice's alleged compliance history for the Bliss Site, and includes copies of compliance and cessation orders, inspection reports, a permit suspension, and a notice of intent to declare bonds forfeit, all issued to Bernice by DEP during 2002. *See* Confer Affidavit, at ¶¶ 10-28 and exhibits B, C, D, F.

right to appeal the bond forfeiture to the Board. 25 Pa. Code § 86.182(b). On December 20, 2002, DEP sent the Forfeiture Declaration by certified mail and first class mail to the last known address for Bernice. A copy was sent, also via certified mail, to the sureties that had issued the bonds for the Bliss Site: Wachovia Bank, Mellon Bank, and Lackawanna Casualty Company. *See* Affidavit of William S. Allen, at ¶ 6 and attached exhibit A. On December 24, 2002, the Forfeiture Declaration sent by certified mail to Bernice was returned to DEP marked "return to sender—box closed—no forward"; the copy sent to Bernice by first class mail was similarly returned to DEP marked "return to sender—no forward order on file—unable to forward."[5] DEP does not assert that it made any further effort to deliver notice of the Forfeiture Declaration to Bernice. Neither Bernice nor the surety companies have appealed the Forfeiture Declaration.

Notice of the Forfeiture Declaration to Third Parties

On December 20, 2002, DEP also sent a copy of the Forfeiture Declaration by first class mail to the following third parties: (1) "Inter-Coal Corporation, 626 Eagle Avenue, West Hempstead, NY 11552"; and, (2) "White Ash Land Association, c/o Charlie Murray RR, Box 1078, Dushore, PA 18614."[6] DEP grounds its motion to dismiss this appeal on the notice sent to Inter-Coal Corporation (Inter-Coal).

Notice was sent by DEP to Inter-Coal because, according to DEP records, Inter-Coal has a financial interest in the Bliss Site's collateral bonds. *See* Confer Affidavit at ¶ 6 and exhibit F. In their motion response, Appellants dispute that Inter-Coal has any such financial interest. Appellants indicate that Inter-Coal is a Delaware sub-S corporation which operates as an

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[5] *See* Allen Affidavit, at ¶¶ 9, 10 and attached exhibits C and D. A few months before issuing the Forfeiture Declaration, in September 2002 DEP sent a letter via certified mail to Bernice stating that DEP had suspended the mining permit for the Bliss Site and notifying Bernice of the agency's intent to declare the Bliss Site bonds forfeit. That certified mail package was also returned to DEP marked "return to sender—box closed—no forward." Confer Affidavit, at ¶¶ 20, 21, 25 and exhibits D and E.

[6] Allen Affidavit at ¶ 7 and exhibit A. White Ash Land Association is the owner of the land on which the Bliss Site is situated. Confer Affidavit at ¶ 7; Notice of Appeal, at ¶ 18. The association has not filed an appeal of the Forfeiture Declaration, nor has it sought to intervene in this appeal.

investment company, and that Appellants are the officers of Inter-Coal; Mr. Barra is President and Mr. Ainbinder is Secretary/Treasurer. *See* Affirmation of Robert Ainbinder, at ¶ 27. Appellants maintain, however, that Inter-Coal has no interest in the collateral bonds at issue in this appeal. Notably, Inter-Coal has not filed an appeal of the Forfeiture Declaration nor sought to intervene in this appeal. Appellants allege that a financial interest in the Bliss Site collateral bonds is currently held by the individual Appellants and by an entity called Capitol Coal Corp.—a corporation in which Appellants are the sole shareholders.[7] In its motion, DEP did not dispute Appellants' allegation that each has an unspecified financial interest in the bonds. Moreover, to date DEP has not contested Appellants' standing to appeal the Forfeiture Declaration.

In its motion, DEP has not alleged that it delivered a copy of the Forfeiture Declaration to Mr. Barra, the individual appellant, whether by mail or otherwise. DEP also does not allege that it mailed a copy addressed specifically to Mr. Ainbinder, the other individual appellant here. Rather, the copy mailed to Inter-Coal was addressed to the corporation, not to Mr. Ainbinder. *See* Confer Affidavit ¶¶ 6, 31, 32; Allen Affidavit ¶¶ 7, 8 and exhibit A. There is also no allegation that notice of the Forfeiture Declaration was published in the Pennsylvania Bulletin.

The fundamental factual premise of DEP's motion is that the individual Appellants received actual notice of the Forfeiture Declaration in December 2002 through the vehicle of the copy mailed by DEP to Inter-Coal on December 20, 2002. More precisely, DEP contends that the notice sent to Inter-Coal should be deemed the earliest actual notice received by Appellants. To support this premise, DEP notes that the mailing address it used for sending notice to Inter-

[7] Ainbinder Affirmation, at ¶¶ 2, 28, and conclusion. Appellants submitted various documents which purport to evidence the financial interest they allegedly hold in the collateral bonds at issue here, though the documents are quite convoluted. *See* Ainbinder Affirmation at exhibits A, B, C, I and J. Copies of the actual collateral bonds issued by the sureties to insure reclamation of the Bliss Site were not submitted by either party. Adding to the confusion is the fact that Capitol Coal Corp. has not filed a separate appeal of the Forfeiture Declaration and has not petitioned to intervene in this appeal.

Coal is the same as Mr. Ainbinder's personal address listed on Appellants' Notice of Appeal (626 Eagle Avenue West Hempstead, NY). The notice sent to Inter-Coal was not returned by the U.S. Postal Service for inability to deliver. DEP concludes that it must be presumed that the Forfeiture Declaration was delivered to Mr. Ainbinder's personal address in December 2002.

No mention is made how Mr. Barra would have received direct notice through the letter to Inter-Coal, given that his personal address listed in the Notice of Appeal (199 Read Avenue, Crestwood, NY) is different from Mr. Ainbinder's. Moreover, Mr. Ainbinder asserts that he did not receive the letter with a copy of the Forfeiture Declaration sent by DEP to Inter-Coal. Appellants allege that they first received notice of the Forfeiture Declaration during a telephone conversation held on January 27, 2003 between Mr. Ainbinder and Steve Starner, a DEP employee in the Hawk Run District Office. On January 28, 2003, Mr. Starner faxed a copy of the Forfeiture Declaration to Mr. Ainbinder; the next day Mr. Ainbinder sent a letter to DEP's central seeking information on how to pursue an appeal.[8] DEP does not dispute that the events between Mr. Starner and Mr. Ainbinder took place in late January 2003.

Appellants filed an appeal of the Forfeiture Declaration with the Board on February 14, 2003. Much of the Notice of Appeal concerns a tortuous story of Appellants' alleged financial interest in the Bliss Site mining operation and the collateral bonds posted by Bernice for the site. Their primary objection to DEP's declaration of forfeiture appears to be that they have a financial interest in the collateral bonds, they have formulated a viable plan for reclaiming the Bliss Site, and they should be given an opportunity to implement their reclamation plan in lieu of the bonds being forfeited.

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[8] *See* Notice of Appeal, at ¶ 1; Ainbinder Affirmation, at ¶ 26; Notice of Appeal, at ¶ 2(d) and attached exhibits; Ainbinder Affirmation, at ¶ 33; Confer Affidavit at ¶ 33.

Standard of Review

The Board will grant a motion to dismiss where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *See, e.g., Smedley v. DEP*, 1998 EHB 1281, 1282. As a matter of practice, when a motion to dismiss puts the Board's jurisdiction at issue the Board has permitted the motion to be determined on undisputed facts outside those stated in the notice of appeal. *See, e.g. Donny Beaver, et al. v. DEP*, 2002 EHB 666, 671 n.4; *Weaver v. DEP*, 2002 EHB 273; *see also Grimaud v. DER*, 638 A.2d 299, 303 (Pa. Cmwlth. 1994) ("where there are no facts at issue that touch jurisdiction, a motion to quash may be decided on the facts of record without a hearing").

The failure to timely appeal an administrative agency's action is a jurisdictional defect which mandates the quashing of the appeal. *Falcon Oil Company v. DER*, 609 A.2d 876, 878 (Pa. Cmwlth. 1992); *Burnside Township v. DEP*, 2002 EHB 700, 702. Nor can the Board disregard the defect, see 25 Pa. Code § 1021.4, and grant an extension of time "in the interests of justice." *West Caln Tp. v. DER*, 595 A.2d 702, 705-06 (Pa. Cmwlth. 1991).

Discussion

DEP argues that the appeal is untimely because it was filed fifty-six days after the copy of the Forfeiture Declaration was mailed to Inter-Coal, and the agency seeks dismissal of the appeal for lack of jurisdiction. Appellants contend that their appeal is timely because their Notice of Appeal was filed within thirty days after they received actual written notice of the Forfeiture Declaration on January 28, 2003.

The applicable rule of decision is found in the Board's Rules of Practice and Procedure, specifically Rule 1021.52. 25 Pa. Code § 1021.52. Rule 1021.52 states in relevant part:

> [J]urisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board in a timely manner, as follows . . .

(1) The person to whom the action of the Department is directed or issued shall file its appeal with the Board within 30 days after it has received written notice of the action.

(2) Any other person aggrieved by an action of the Department shall file its appeal with the Board within one of the following:

(i) Thirty days after the notice of the action has been published in the *Pennsylvania Bulletin.*

(ii) Thirty days after actual notice of the action if a notice of the action is not published in the *Pennsylvania Bulletin.*

25 Pa. Code § 1021.52(a).

The permittee and the sureties are the persons to whom the Forfeiture Declaration was directed or issued; as third parties Appellants fall within the category of "any other person aggrieved by an action of the Department." There being no allegation that notice of the Forfeiture Declaration was published in the Pennsylvania Bulletin, Appellants had thirty days after they received actual notice of the Forfeiture Declaration to file their appeal with the Board. Thus, the questions are when did Appellants, the individuals Robert Ainbinder and Robert Barra, receive actual notice of the Forfeiture Declaration and, did they file their Notice of Appeal with the Board within thirty days after receiving actual notice of DEP's action.[9]

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[9] DEP cites to 42 Pa.C.S. § 5572 as support for a puzzling proposition that the time period for appealing a DEP final action to the Board begins to run on the date that the final action was *mailed* by DEP to an appealing party, as opposed to the date that the appealing party *received* actual notice—which the Board's Rule clearly contemplates.

DEP's citation to 42 Pa.C.S. § 5572 is mistaken. The regulations promulgated by the Board govern the conduct of proceedings before it. In the Environmental Hearing Board Act, 35 P.S. § 7511 *et seq.*, the Legislature expressly granted the Board authority to promulgate such procedural regulations, including time limits for taking appeals. *See* 35 P.S. § 7514(g) (hearings "shall be conducted in accordance with the regulations of the board"); 35 P.S. § 7515(c) ("The rules committee shall recommend to the board regulations for hearings conducted by the board . . . . The regulations shall include time limits and procedure for the taking of appeals . . . . Regulations under this subsection shall be promulgated by the board upon a majority affirmative vote on the recommended regulations.").

Moreover, 42 Pa.C.S. § 5572 applies only to appeals from a government unit "to a court." *See* 42 Pa.C.S. § 5571(b). The Legislature established the Board "as an independent *quasi-judicial agency.*" 35 P.S. § 7513(a) (emphasis added); *see also Browning-Ferris Industries, Inc. v. Department of Environmental Protection*, 819 A.2d 148, 153 (Pa. Cmwlth. 2003); *Department of Environmental Protection v. North American Refractories Company*, 791 A.2d 461, 462 (Pa. Cmwlth. 2002). Thus, 42 Pa.C.S. § 5572 is simply inapplicable to appeals from a DEP final action to the Board. *Cf. Tierney v. Upper Makefield Twp.* 654 A.2d 621 (Pa. Cmwlth. 1995) (applying 42 Pa.C.S. §§ 5571-5572 to appeal to Common Pleas Court from township board of supervisors land use decision); *PennDOT v. Walzer*, 625 A.2d 1346 (Pa. Cmwlth. 1993) (appeal of DOT license suspension to Common Pleas Court).

With respect to Appellant Robert Barra, the determination is straightforward. DEP does not allege that it sent a copy of the Forfeiture Declaration addressed to Mr. Barra, whether at his personal address or anywhere else. DEP also does not provide any evidence that when it mailed a copy to Inter-Coal at the address in Hempstead, New York in late December 2002, Mr. Barra received notice of the Forfeiture Declaration. The only cognizable evidence in the record of notice being received by Mr. Barra is Appellants' affirmations that Mr. Barra received notice on January 28, 2003, after Mr. Starner faxed a copy of the Forfeiture Declaration to Mr. Ainbinder. Consequently, the thirty-day time period for Mr. Barra to appeal the Forfeiture Declaration began to run on January 28th, the filing of the Notice of Appeal was within the thirty days provided by Rule 1021.52(a)(2)(ii), and his appeal was timely filed.

The analysis for Mr. Ainbinder is more complicated, but the result is the same. DEP argues that the mailing of the Forfeiture Declaration to Inter-Coal should be deemed to have provided Mr. Ainbinder with actual written notice by late December 2002 because Inter-Coal's address is the same as Mr. Ainbinder's. DEP relies on the "general principle of law that the depositing of a properly addressed prepaid letter into the mails raises the presumption that it reaches its destination and that the mailing of the letter is *prima facie* evidence of receipt by the person(s) to whom it was mailed." *Moore v. Department of Public Welfare*, 564 A.2d 555, 557 (Pa. Cmwlth. 1989). Moreover, a denial of receipt is not sufficient, in and of itself, to rebut this presumption. *Id.*; *see also Meierdick v. Miller*, 394 Pa. 484, 487 (1959).

This argument would have persuasive force but for the fact that Inter-Coal did not appeal; the individual Robert Ainbinder is the appellant. The general rule is that "when mail has been sent to the proper address and not returned, the *intended recipient* is presumed to have actually received that mail." *Boofer v. Lotz*, 797 A.2d 1047, 1050 (Pa. Cmwlth. 2002), *rev'd on other*

grounds, 2004 Pa. LEXIS 66 (Feb. 17, 2004) (emphasis added). This rule has no application here because the intended recipient of the letter sent by DEP to Inter-Coal was the corporation, not the Appellant Robert Ainbinder. Thus, Mr. Ainbinder cannot be presumed to have received the notice sent to Inter-Coal.

Acceding to DEP's request that I deem receipt of actual notice by operation of a legal presumption would run counter to the Board's general insistence on precision in the context of providing notice of DEP final actions. *See, e.g., Solebury Township et al. v. DEP*, 2003 EHB 208, 213-17 (denying motion where notice in Pennsylvania Bulletin did not precisely state that DEP had approved 401 Water Quality Certification application); *Laurel Land Development v. DEP*, 2003 EHB 500 (denying motion where confusion existed as to whether advanced copy of DEP action was the operative notice for purposes of appeal). The Board has adopted this approach because notice will commence the clock on a person's opportunity to assert his due process rights. Moreover, if DEP wants to assure that the appeal period begins to run for all third parties, the agency need only publish proper notice of its bond forfeiture declaration in the Pennsylvania Bulletin.

Mr. Ainbinder has also come forward with more than a simple denial of receipt of the December 20th letter to Inter-Coal. He has provided evidence of a telephone conversation with DEP employee Mr. Starner, a fax transmission from Mr. Starner conveying a copy of the Forfeiture Declaration on January 28, 2003, and a letter sent by Mr. Ainbinder to DEP's central office the next day concerning his intent to appeal. On the record presently before me, this evidence tends to confirm Mr. Ainbinder's account of when he received notice, particularly in light of the absence of evidence from DEP controverting his account.

As the non-movant, Appellants are entitled to all factual inferences being drawn in their

favor. *See, e.g., Ainjar Trust v. DEP*, 2000 EHB 505, 507. The facts material to the question of notice to Mr. Ainbinder having been placed at issue by Appellants, it is not clear that DEP is entitled to judgment as a matter of law on the question of the Board's jurisdiction over Mr. Ainbinder's appeal.

Accordingly, the motion will be denied with respect to both Appellants.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT BARRA and ROBERT AINBINDER	:	
v.	:	**EHB Docket No. 2003-038-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

And now this 16th day of April 2004, it is hereby ORDERED as follows:

1. The Department of Environmental Protection's Motion to Dismiss is denied. An order scheduling a hearing and relevant pre-hearing procedures will issue shortly.

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Administrative Law Judge
Member

Dated: April 16, 2004

c: **DEP Bureau of Litigation**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CHIPPEWA HAZARDOUS WASTE, INC.	:	
	:	
v.	:	**EHB Docket No. 2002-295-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 16, 2004**

ADJUDICATION

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis:

An asbestos removal contractor appealed from the Department's assessment of a $26,000 civil penalty for violations relating to the contractor's handling of waste at an asbestos removal project at a school. The contractor did not challenge the lawfulness or reasonableness of the penalty amount, instead arguing that no violations occurred. The Board holds that the violations did in fact occur, and that the incidents in question constituted violations of the applicable regulations.

FINDINGS OF FACT

1. The Department of Environmental Protection (the "Department") is the agency with the duty and authority to administer and enforce the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119 (1959), *as amended*, 35 P.S. §§ 4001 – 4015 ("Air Pollution Control Act"), the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, No. 97, *as amended*, 35 P.S. §§ 6018.101-6018.1003 ("Solid Waste Management Act"), Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 510-17

("Administrative Code"), and the rules and regulations promulgated under those statutes. (AFOF 1.)[1]

2. Chippewa Hazardous Waste, Inc. ("Chippewa") is a West Virginia corporation that removes asbestos in buildings as part of renovation activities. (AFOF 2.)

3. During the summer of 2001, the Mt. Pleasant School District (the "School District") renovated several buildings in its Junior/Senior High School complex located in Mt. Pleasant Borough, Westmoreland County (the "school"). (AFOF 4.)

4. The School District determined that asbestos-containing materials ("ACM"), including roofing materials, were present in the buildings to be renovated. (AFOF 5-7.)

5. The School District hired Chippewa to remove ACM, some of which was friable ACM, from certain school buildings undergoing renovation activities. (AFOF 18, 19, 21, 27.)

6. On June 29, 2001, Chippewa stored asbestos-containing waste material destined to be transported off the school site in bags, a small number of which did not have labels setting forth the name of the waste generator and the location at which the waste was generated. (AFOF 28; Transcript pp. (hereinafter "T.") 94-95, 98-99, 131; Commonwealth Exhibit (hereinafter "C.Ex.") 4.)

7. On July 3, 2001, Chippewa failed to post and failed to make available for inspection by the Department at the renovation site evidence that a supervisor present at the site had completed regulatorily required asbestos training. (T. 102-103, 261-262; C.Ex. 5.)

8. Also on July 3, 2001, Chippewa stored asbestos-containing waste material in bags, a small number of which had been punctured and were not leak-tight, dust-tight, or leak

[1] Where the Department and Chippewa have agreed to a proposed finding of fact, and the Board has adopted the finding as part of this Adjudication, the citation to the Agreed Finding of Fact will be as follows: ("AFOF 1").

proof. (AFOF 37; T. 101, 124, 132; C.Ex. 5.)

9. On July 19, 2001, Chippewa stored asbestos-containing waste material in bags, a small number of which were punctured and, therefore, not leak-tight, dust-tight, or leak proof. (AFOF 43; T. 117-119, 120-121, 156, 161; C.Ex. 6.)

10. On October 22, 2002, the Department assessed a civil penalty against Chippewa of $26,000, calculated as follows:

6/29/01	Labeling	$5,000	
7/03/01	Leaking bags	5,000	
	Posting training	5,000	
7/19/01	Leaking bags	15,000	$ 30,000

Add	Factor re company net worth	$ 2,000
Less	Negligent, not willful, violations	(1,000)
Less	No compliance history	(1,000)
Less	Posting violation lack of severity	(4,000)
		$ 26,000

(C.Ex. 18, 22.)

DISCUSSION

In *Sunoco, Inc. (R&M) v. DEP*, EHB Docket No. 2002-268-K, slip op. at 42 (Adjudication April 12, 2004), we reiterated our standard of review in appeals from civil penalty assessments as follows:

> The Board reviews all DEP final actions *de novo*. *Pequea Township v. Herr*, 716 A.2d 678, 686-87 (Pa. Cmwlth. 1998); *Smedley v. DEP*, 2001 EHB 131, 155-60. DEP bears the burden of proof with respect to the civil penalty [assessment]. 25 Pa. Code § 1021.122(b)(1). To carry its burden, DEP must prove by a preponderance that: (1) the underlying violations of law giving rise to the assessment in fact occurred; (2) the penalty imposed is lawful; and, (3) the penalty is reasonable and appropriate. *See, e.g, Stine Farms & Recycling, Inc. v. DEP*, 2001 EHB 796, 811-13.
>
> In reviewing the penalty calculation, we must ascertain whether DEP properly applied the statutory penalty-assessment criteria to the facts of the case, and whether the penalty amount is reasonable and appropriate for the violations and surrounding circumstances.

> *F.R. & S., Inc. d/b/a Pioneer Crossing Landfill v. Department of Environmental Protection*, 761 A.2d 634, 639 (Pa. Cmwlth. 2000) (penalty amount must be reasonable); *Keinath v. DEP*, No. 2001-253-MG, 2003 Pa. Envirn. LEXIS 9, at 14-15 (EHB, Jan. 31, 2003); *202 Island Car Wash, L.P. v. DEP*, 2000 EHB 679, 690. Where DEP has erred in its application of the statutory criteria, or assessed an unreasonable penalty amount, the Board may adjust the penalty. *Pickelner Fuel Oil, Inc. v. DEP*, 1996 EHB 602, 609.

Although the Department bears the burden of proof, the issues in dispute are defined by the appellant's notice of appeal. *Fuller v. Department of Environmental Resources*, 599 A.2d 248 (Pa. Cmwlth. 1991); *Moosic Lakes Club v. DEP*, 2002 EHB 396, 405. In other words, the Department is not required to prove elements of its case that an appellant concedes or does not put at issue.

In *Sunoco*, the parties stipulated that the violations giving rise to the assessment occurred and the Board, therefore, focused upon the amount of the assessment. In this appeal, we have the opposite situation. Chippewa has not challenged the penalty amount in its notice of appeal or at any point thereafter in the proceedings. Chippewa's notice of appeal set forth the following challenges:

> a. The Department's action was selective.
> b. The alleged violations were caused by DEP's own inspector.
> c. The asbestos generator identification labels were properly affixed by Chippewa until removed by DEP's own inspector.
> d. The regulated asbestos-containing waste was properly stored until DEP's own inspector caused the storage bags to become damaged.
> e. Evidence of required asbestos training was in fact posted at the job site.
> f. Chippewa did not violate Section 8 of the APCA nor Section 610 of the SWMA.

Chippewa confirmed at the hearing that it had not raised a challenge to the civil penalty. (T. 273-74.) Chippewa's post-hearing brief does not cite to any evidence or otherwise substantively argue that the amount of the penalty is unlawful or unreasonable or that a lower amount (greater

than zero) would be appropriate. *See* 25 Pa. Code § 1021.131(c) (issue not raised in post-hearing brief waived). The closest that Chippewa comes to contesting the amount of the penalty in its post-hearing brief is the following *non sequitor*: "By failing to set forth the specifics as to its calculation of the Civil Penalty, DEP waived its right to object as to Chippewa's appeal of the lump sum assessment amount." Chippewa adds that the Board may decide issues that fall within broadly worded objections in a notice of appeal. A challenge to the amount of the penalty assessed against it, however, can in no way be gleaned from Chippewa's notice of appeal. The fact that the Department did not spell out the components of the total assessment in the assessment itself did not impede a challenge to the penalty amount. A simple statement in the notice of appeal to the effect that the penalty amount was unreasonable would undoubtedly have done the job.

Rather than challenging the amount of the penalty, Chippewa has strenuously argued that *no* civil penalty is appropriate because the underlying violations did not occur.[2] We must, therefore, focus our attention accordingly.

Evidence of Asbestos Training

Pennsylvania has incorporated by reference the federal regulations governing the handling of asbestos-containing materials known as the National Emission Standards for Hazardous Air Pollutants ("NESHAP") standards, which are codified at 40 C.F.R. Part 61. 25 Pa. Code § 124.3. One of those standards requires an operator of a renovation project to ensure that a supervisor is present at the project who has completed appropriate asbestos handling

[2] Other than fleeting reference to the Department's failure to focus upon another asbestos contractor working at the school on roofing materials, Chippewa did not pursue its claim that "the Department's action was selective" in its post-hearing brief.

training. The operative regulation goes on to state:

> Evidence that the required training has been completed shall be posted and made available for inspection by the [Department] at the demolition or renovation site.

40 C.F.R. § 61.145(c)(8). The Department assessed a penalty against Chippewa for failing to comply with this requirement on July 3, 2001.

The Department's inspector, Fredrick Walter, testified that he did not see any evidence of training posted. When he asked one of Chippewa's supervisors, Russell Evans, Sr., to make the evidence available, Evans indicated that he was not able to do so. (T. 103.)

Chippewa now claims that the evidence of training was available in the general contractor's trailer. The only record support that Chippewa cites for this claim, however, was testimony of Chippewa's consultant that *the consultant's* training certificate was available at some point in the trailer. (T. 240-241.) The consultant conceded, however, that he was not an on-site supervisor whose training certificate needed to be posted on the day in question. The consultant was not able to testify that the certificates that needed to be posted were in fact posted or otherwise available. Evans did not testify regarding the issue. In fact, there is *no* evidence on the record to rebut Walter's testimony that training evidence was neither posted nor made available upon request on the date in question.

Chippewa argues that the Department has required posting in dangerous proximity to the asbestos work. We do not understand the Department to have taken such a position in this case. The location of the ideal, required, or acceptable posting place never arises in this case because Chippewa did not post *anywhere*. Still further, the issue of posting can be completely put aside because the regulation also requires that the evidence be "made available." Here, the unrebutted testimony of Walter was that it was not made available. If the training evidence really was

available at the general contractor's trailer (and, again, there is no proof of this), the slightest cooperation on Chippewa's part might have avoided the violation and the penalty.

Chippewa has launched a broad-based attack on Walter's credibility throughout these proceedings. (See, Notice of Appeal, quoted above.) Chippewa in its post-hearing brief appears to have chosen not to pursue the most serious charges that it previously leveled against Walter. Chippewa's post-hearing theory is essentially that Walter "simply developed an ill-will toward Chippewa and then misapplied the law to create violations." (Brief p. 31.) To the extent that Chippewa maintains its attack on Walter's credibility or competence to testify regarding the facts giving rise to the posting violation--and the other violations as well--we reject the attempt. We find Walter to be a credible witness in general, and we find his testimony regarding the pertinent facts in particular to be credible. We do not doubt that an acrimonious relationship developed in the field, but that acrimony did not shade Walter's testimony or interfere with his ability to perceive, report, and accurately and truthfully recount the relevant facts.[3]

Labels

An operator engaged in an asbestos renovation project must comply with the following requirement:

> For asbestos-containing waste material to be transported off the facility site, label containers or wrapped materials with the name of the waste generator and the location at which waste was generated.

40 C.F.R. § 61.150(a)(1)(v). *See also* 25 Pa. Code § 299.152(b) (storage containers of friable asbestos shall be labeled with identification label as required under NESHAP standards).

Walter testified based upon close personal observation on June 29, 2001 that at least three bags of asbestos-containing waste in the dumpster at the site did not have labels affixed to them.

[3] To the extent Chippewa argues that Walter misapplied or misinterpreted the regulations because of his ill-will, the bulk of this adjudication dispels that claim.

The testimony is credible and set forth in appropriate and convincing detail. A Chippewa employee participated in the inspection of the bags, but was not called to rebut Walter's version of the facts. Chippewa's supervisor, Evans, conceded that labels could have been missing. (T. 225-226.) Chippewa actually presented no evidence to suggest that Walters was mistaken about the missing labels.

Instead, Chippewa argues that it was not necessary for the bags to be labeled on June 29 so long as the bags were labeled before being transported off the site. Chippewa points out that the Department did not prove that the bags remained unlabeled when they were taken away. (Brief pp. 26-27.)

The initial problem with Chippewa's theory is that no evidence was presented at the hearing to suggest that the bags that were with asbestos-containers waste missing labels were subsequently relabeled.[4] Furthermore, the regulation requires containers that are eventually to be transported off-site to be labeled. The regulation does not specify a time for labeling or tie the labeling requirement directly to the act of transporting the container. Therefore, if there is a container of asbestos-containing waste and that container is to be transported off-site at *any* time, the container needs to be labeled at *all* times. It is as simple as that. It is not acceptable for the container to sit around for an indefinite period of time with no identification so long as it is eventually labeled before leaving the site. In short, even if there were proof that Chippewa's bags were relabeled before transport, that fact would not excuse the violation that was observed on June 29.[5]

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[4] Chippewa cites the deposition of Russell Evans, Jr. Mr. Evans attended the entire hearing but did not testify. His deposition testimony regarding relabeling is confusing, at best, and certainly does not show to our satisfaction that Chippewa relabeled the bags in question. (C.Ex. 23, pp. 58-59.)

[5] The Environmental Protection Agency's view of the regulation is consistent with this reading of the regulation. *See, In the Matter of Republic Industries, Inc.,* 1993 EPA ALJ LEXIS 432, Docket No. CAA-IV-45-01, May 11, 1993 (unlabeled bags on truck awaiting transport a violation; argument rejected that

Chippewa also seems to suggest that there was no violation of the regulation so long as Chippewa affixed the labels to the bags; it is not responsible for ensuring that the labels remain affixed. (Brief p. 28.) We have the same response. It is not acceptable to store asbestos waste in unidentified containers for indefinite periods of time. The practice is not made acceptable by eventually labeling the containers before off-site shipment, and it is not made acceptable by temporarily labeling the containers when they are first filled. The point of the regulation is to ensure that the container's potentially dangerous contents are apparent from the container itself. If the material is being stored in the container, it must be labeled.

Chippewa asserts that the labels fell off of the bags as a result of Walter's manhandling. (Brief p. 28.) This is pure speculation. Chippewa cites no record support for the claim. In fact, the record shows that Chippewa's employee, not Walter, actually lifted the unlabeled bags at Walter's request. (T. 98-99.) Chippewa's generalized effort through the testimony of Mr. Evans, Sr. to show that Walters caused the labels to fall off (or the bags to be damaged, see *infra*) was internally inconsistent and generally unsuccessful. (*See, e.g,* T. 216 (it is "possible" Walter stepped on bags).)

Chippewa seems to argue that it is not necessary to label every container. (Brief p. 9, 12.) On this point Chippewa is simply wrong. Similarly, to the extent that Chippewa intimates that containers need not be labeled so long as the dumpster into which the containers are placed is labeled is also incorrect. No such exception appears in the regulation.

As with the posting violation, we are struck by the fact that the slightest amount of cooperation on Chippewa's part would almost certainly have avoided this situation. Accidents do happen, and in a project where hundreds of bags of waste are being handled, it is not particularly shocking to hear that labels occasionally fall off. Had Chippewa promptly relabeled

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regulation complied with if bags subsequently labeled at moment of transport).

the bags, we doubt that we would be writing this adjudication. In fact, in his inspection report, Walter simply directed that the bags be relabeled and that he be notified so as to allow for reinspection. (C.Ex. 4.) Not only is there no credible evidence of relabeling, Chippewa did not notify Walter before shipping the containers off site. (T. 235.)

Punctured Bags

Asbestos-containing waste must be stored in leak-tight containers. 40 C.F.R. § 61.150(a)(1)(iii); 25 Pa. Code § 299.152(a) (leak proof plastic bags). "Leak-tight means that solids or liquids cannot escape or spill out. It also means dust-tight." 40 C.F.R. § 61.141.

We find credible Walter's testimony regarding his close, personal observation that at least three bags were punctured on July 3. The contents were visible and/or protruding from the bags. (T. 101, 124, 132-133.) We find Walter's testimony credible that he personally observed leaking bags on July 19. (T. 117-118.) That testimony is corroborated by the credible eyewitness testimony of Jeff Ament of Volz Environmental. (T. 156-157.)

There is no testimony from Chippewa that the bags were not leaking. As discussed above, Chippewa's effort to generally impeach Walter was unsuccessful. There is no evidence that Walter or Ament themselves caused the leaks and punctures that gave rise to civil penalties. Indeed, that theory is inconsistent with Walter's accounting, which is that he observed the leaks from immediately next to, but outside of, the roll-off container in which the bags were stored. (T. 116.) It is also inconsistent with Ament's description of the inspection. (T. 156.) In short, it really amounts to little more than unfounded speculation on Chippewa's part.

Chippewa's argument that it is not responsible because the containers (i.e. bags) in question were leak tight at first is not supported by any record evidence. Even if it were, the argument would suffer the same fate as Chippewa's argument that labels need not remain affixed

to containers. Chippewa is responsible for ensuring that containers remain leak tight so long as they are in Chippewa's control and contain asbestos-containing waste. The contention that it is acceptable for containers to later spew their contents so long as they are leak proof when initially filled simply defies common sense.[6]

Chippewa points out that there was no testimony that the contents of the compromised bags leaked out of the roll-off container. Had Chippewa challenged the amount of the civil penalty, such evidence might have been relevant, but such evidence does not change the fact that the operative containers--the bags--were not leak tight. An open dumpster is not an acceptable leak tight container, 25 Pa. Code § 299.152(a), and Chippewa has not seriously contended otherwise.

We reject Chippewa's suggestion that the Department was required to testify *how* the bags come to be punctured in order to show that a violation occurred. It is the storage in a leaking container that constitutes the violation, not the act of puncturing the container itself. Finally, as with the other violations discussed above, we are compelled to note that, if Chippewa had simply taken the trouble to rebag the leakers and notified the Department accordingly, we doubt that this litigation would have been necessary.

CONCLUSIONS OF LAW

1. The Department bears the burden of proof in an appeal from a civil penalty assessment. 25 Pa. Code § 1021.101(1).

2. In an appeal from a civil penalty assessment, the Department must ordinarily prove by a preponderance of the evidence that (1) the underlying violations of law giving rise to

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[6] EPA's view of the regulation is consistent with this reading. *See, In the Matter of Industrial Waste Cleanup, Inc.,* 2000 EPA ALJ LEXIS 65, Docket No. CAA-5-99-019, August 30, 2000 (leak-tight requirement begins upon bagging and continues through disposal).

the assessment in fact occurred, (2) the penalty imposed is lawful, and (3) the penalty is reasonable and appropriate. *Sunoco, Inc. (R&M) v. DEP,* EHB Docket No. 2002-268-K, slip op. at 42 (Adjudication April 12, 2004); *Stine Farms & Recycling, Inc. v. DEP*, 2001 EHB 796, 811-13.

3. In reviewing the penalty calculation, we must ascertain whether DEP properly applied the statutory penalty-assessment criteria to the facts of the case, and whether the penalty amount is reasonable and appropriate for the violations and surrounding circumstances. *F.R. & S., Inc. d/b/a Pioneer Crossing Landfill v. Department of Environmental Protection*, 761 A.2d 634, 639 (Pa. Cmwlth. 2000) (penalty amount must be reasonable); *Keinath v. DEP*, No. 2001-253-MG, 2003 Pa. Envirn. LEXIS 9, at 14-15 (EHB, Jan. 31, 2003); *202 Island Car Wash, L.P. v. DEP*, 2000 EHB 679, 690. Where DEP has erred, the Board may adjust the penalty.

4. The Board will not review the lawfulness or reasonableness of the civil penalty amount where, as here, an appellant does not challenge the penalty amount in its notice of appeal or at any other point throughout the course of the appeal.

5. Asbestos is a "hazardous air pollutant" under the Air Pollution Control Act, the federal Clean Air Act, and the regulations promulgated under those statutes.

6. ACM is "friable" if, when dry, can be crumbled, pulverized, or reduced to powder by hand pressure. The term includes nonfriable asbestos-containing waste that is rendered friable during management. 40 C.F.R. § 61.141; 25 Pa. Code § 287.1.

7. Chippewa's failure on July 3, 2001 to post or at least make available evidence of proper training constituted a violation of 40 C.F.R. § 61.145(c)(8).

8. Chippewa's failure on June 29, 2001 to label containers storing asbestos waste constituted a violation of 40 C.F.R. § 61.150(a)(1)(iv) and 25 Pa. Code § 299.152(b).

9. Chippewa's failure on July 3 and July 19, 2001 to store asbestos waste in leak-tight, dust-tight, leak-proof containers constituted a violation of 40 C.F.R. § 61.150(a)(1)(iii) and 25 Pa. Code § 299.152(a).

10. The Department carried its burden of proving by a preponderance of the evidence that the violations giving rise to the penalty that it assessed against Chippewa did in fact occur.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CHIPPEWA HAZARDOUS WASTE, INC.	:	
	:	
v.	:	**EHB Docket No. 2002-295-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 16th day of April, 2004, this appeal is dismissed. The Secretary of the Board shall direct a release of the funds submitted by certified check on behalf of Appellant Chippewa Hazardous Waste, Inc. to the Board and placed on deposit in escrow in the Commonwealth account by the Department of Environmental Protection, Division of Licensing and Bonding on behalf of Chippewa Hazardous Waste, Inc. (EHB Docket No. 2002-295-L) to the Department for handling.

ENVIRONMENTAL HEARING BOARD

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BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: April 16, 2004

c: **DEP Bureau of Litigation:**
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WILLIAM T. PHILLIPY IV
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DONALD C. RUDDY and PAUL G. MORROW	:	
	:	
v.	:	**EHB Docket No. 2003-032-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SOLEBURY TOWNSHIP, Intervenor	:	**Issued: April 16, 2004**

OPINION AND ORDER DENYING APPELLANTS' MOTION IN LIMINE

By Michael L. Krancer, Chief Judge and Chairman

Synopsis:

Appellants' Motion In Limine is denied as the matters sought to be barred from evidence are within the relevant matters of inquiry in the appeal and indeed have been raised by Appellants themselves.

Background

This is an appeal of the Department's denial of Appellants' "private request" to the Department to order Solebury Township to revise its official Act 537 Sewage Facilities Plan (Plan).[1] In short, Appellants, between them, own seven undeveloped lots near New Hope, Bucks

[1] A "private request" under Act 537 is provided for in Section 5(b) which provides that "any person who is a resident or property owner in a municipality may request the department to order the municipality to revise its official plan where said person can show that the official plan is inadequate to meet the resident's or the property owner's sewage disposal needs." 35 P.S. § 750.5(b). The regulations at 25 Pa. Code 71.14(a) provide that a property owner, "may file a private request with the Department requesting that the Department order the municipality to revise or implement its official plan if the resident or property owner can show that the official plan is not being implemented or is inadequate to meet the resident's or property owner's sewage disposal needs." 25 Pa. Code § 71.14(a).

County and they are contending that they require a revision to the Solebury Plan to allow them to hook into a public sewage system. The present Plan calls for on-lot sewage. Appellants claim, for a host of reasons, that on-lot sewage for these lots is not a viable alternative. The Department's Motion For Summary Judgment was denied by Order dated December 22, 2003 which stated that a majority of the Board found that there were disputed issues of fact which precluded summary judgment. Trial is scheduled to begin on Monday, May 17, 2004 in the Norristown Courtroom.

Appellants have brought to us a Motion In Limine which asks that we preclude Appellees from introducing any evidence, testimonial or documentary, "which [is] beyond the scope of this appeal". This appeal, they say, is limited to "those matters specifically placed at issue in the Department's denial letter which has been appealed." The denial letter provides two bases for the Department's denial of the private request. It provides as follows:

> 1. The request failed to demonstrate that Solebury Township's Official Sewage Facilities Plan is inadequate to meet the sewage disposal needs of the subject properties, as required by Section 71.14(a).
>
> The request indicated that on-lot sewage disposal systems could not be installed on these lots. However, no site specific testing was provided to document that on-lot sewage disposal systems are not feasible for the referenced properties.
>
> 2. The private request also failed to document that the applicant's original official plan revision request to the municipality was consistent with the Department's Rules and Regulations. Section 71.52 requires official plan revisions for new land development to be submitted to the Department in the form of a complete sewage facilities planning module. Section 71.53 outlines municipal responsibilities to act upon these planning module revisions. The submitted private request did not include a copy of the required planning module or any documentation that the required planning module was submitted to the municipality. In evaluating a request to order a municipality to revise its Official Sewage Facilities plan, the Department must consider whether the proposed sewage facilities and documentation supporting the proposed sewage facilities are consistent with our Rules and Regulations. Without the required planning module, the Department cannot make that determination.

The specific target of the Motion In Limine is any evidence relating to land use or zoning matters, including "any Comprehensive Plan".

Discussion

The Motion In Limine is not well taken and must be denied. First, the Appellants misunderstand the scope of this case and our scope of review of the Department's action. Appellants have the affirmative obligation to prove that Solebury Township's official sewage facilities plan is either not being implemented or is inadequate to meet their sewage disposal needs. 35 P.S. § 750.5(b), 25 Pa. Code § 71.24. That job is broader in scope than merely refuting the two stated grounds for denial outlined in the Department's denial letter.

On the other side of the coin, our scope of review is *de novo*. That means, in part, that we accept evidence that may not have been a part of the Department's review process. *Leatherwood v. DEP*, 819 A.2d 604, 610-11 (Pa. Cmwlth. 2003). Indeed, in this case, that would seem exactly what the Appellants would want us to do since the essence of the appeal is that the Department did not give full consideration to their points and, if it had, it would have issued an order to Solebury requiring it to revise its Plan. We assume, by the way, that this relief is what Appellants seek here, *i.e.*, our issuance of an order to the Department to require Solebury to revise its Plan to accommodate what Appellants want. In order for Appellants to succeed in securing that outcome they would obviously need to prove by a preponderance of the evidence not just that the Department's grounds for denial may have been inadequate or inapposite but that the Solebury Plan is inadequate to meet their sewage disposal needs.

Also, what Appellants request in the Motion In Limine seems quite anomalous based on what Appellants have been claiming up to now in this case. Appellants are the ones who have contended that the various parcels at issue are either in a floodplain or have steep slopes and that

these reasons, among others, make them not suitable for on-lot sewage. Indeed, these allegations would seem to be at the heart of their case. In any event, these are some of the disputed issues of fact that need to be resolved at trial and would need to be resolved in Appellants' favor in order for them to have any chance of prevailing in this case. The Zoning Ordinance which Solebury seeks to introduce, which is attached to its Pre-Hearing Memorandum as proposed Exhibit 1, and which is among the apparent targets of the Motion In Limine, deals with, among other things, uses in floodplains and steep slope matters. Also, Appellants themselves cited in their Notice of Appeal the very Zoning Ordinance that they are now seeking to bar from evidence. Paragraph 2.b. of the Notice of Appeal states that, "in such floodplain district the Township under its Ordinance Article 14 Section 1408E(Ac.) prohibits any on-site sewage disposal system". We are not sure about the Section citation in the Notice of Appeal but the Section 1408 of the Zoning Ordinance which is Solebury's proposed Exhibit 1 is entitled "Floodplain Conservation District Provisions" and it, of course, deals with that subject matter. How that documentation which deals with these matters could now be barred from evidence at the request of the Appellants is hard to fathom. At the very least, although we are not sure how Appellees plan to use this prospective evidence, it seems fair potential rebuttal evidence to counter allegations that have been made by Appellants and, indeed, seem central to Appellants' theory of their case.

Appellants' citation to *New Hanover Corporation v. DER*, 1991 EHB 445 is not on point here.[2] The issue there was whether to grant a petition to intervene of the host Township in a case involving the denial of a permit for the expansion of a landfill within the Township, not whether a certain genre of evidence should be barred from the trial. That case dealt with the law of

[2] Appellants mistakenly cite the case as "*New Hanover Township v. DER*" whereas it is actually *New Hanover Corporation v. DER*. The Corporation was the appellant whose application for expansion of its landfill in New Hanover Township, Montgomery County had been denied.

intervention, not the law of or rules of evidence. The Board did limit the scope of the Intervenor Township's intervention to the 20 reasons cited by the Department in its denial letter, denying the Township the ability to present even further reasons which would have supported denial. The Board reasoned that intervention should not be a vehicle to overly broaden the scope of an appeal. The Board concluded in that regard that to allow the Intervenor to present alleged additional reasons supporting a denial would "inject a multiplicity of issues, create confusion and further prolong the resolution of [the] matter." *Id.* at 448. Here, though, that logic does not fit because, as we noted before, the Appellants, under Act 537 and the regulations, must make an affirmative demonstration that the Solebury Township Plan is inadequate to meet their needs. Solebury is not seeking to add any issues or to broaden the scope of the appeal. It is only attempting to answer the allegations made by Appellants during the course of the proceedings regarding matters such as floodplains and steep slopes.

Likewise, the *South Fayette Township v. DER*, 1991 EHB 900, has nothing to do with this case. In that case, the Township's appeal had asserted that the permit granted would result in non-compliance with Township zoning ordinances. The Board held that such an allegation was beyond the purview of the Board and, thus, it barred evidence on that topic. That is not what we have here. We do not have an appellant claiming that a DEP action results in a violation of zoning ordinances. What we do have is an Appellant who has raised certain land use and/or zoning points in support of its argument that on-lot sewage could not be used on the lots in question. For the Township to seek to probe and challenge that allegation is not problematic in terms of the Board's province.

Finally, Appellants' citation to *Delaware County Community College v. Fox*, 342 A.2d 468 (Pa. Cmwlth. 1975)(*DCCC*) is equally off-point. In that case, the Court mentioned, in a

discussion not central to the holding of the case, that the Department and/or the Board could not, in effect, override or "second-guess" zoning and land use decisions in the course of Act 537 review. Thus, the Court suggests that a declination of approval of an otherwise compliant sewage plan ought not to be based solely on land use considerations. *Id.* at 478. The real issue in the *DCCC* case, though, was the application of the Clean Streams Law, Article I, Section 27 of the Pennsylvania Constitution and *Payne v Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973). *DCCC*, *supra*, at 478-79. Here, as we have noted, the putative land use and/or zoning issues seem to have been raised in the first place by Appellants, apparently in an effort to persuade us that land conditions, land use restrictions, zoning restrictions, or some combination thereof, may exist which would preclude on-lot sewage for these particular lots.[3]

Given all of this we have no hesitancy denying Appellants' Motion In Limine.

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[3] Moreover, *DCCC* was decided before the passage of Acts 67 and 68 of 2000. As we said about these Acts in *Drummond v. DEP*, 2002 EHB 413,

> These acts are the much talked about and much written about amendments to the Municipalities Planning Code which direct that state agencies "shall consider and may rely upon comprehensive plans and zoning ordinances when reviewing applications for the funding or permitting of infrastructure or facilities". *See* 53 P.S. § 10619.2. To date we are not aware of any judicial decisions dealing with the Department's compliance, or lack thereof, with these newly enacted provisions.

Id. at 433. We are still not aware of any judicial decisions, from us, the Commonwealth Court or the Supreme Court, dealing with the parameters of Act 67 and 68 with reference to actions of the Department.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DONALD C. RUDDY and PAUL G. MORROW	:	
	:	
v.	:	**EHB Docket No. 2003-032-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SOLEBURY TOWNSHIP, Intervenor	:	

ORDER

AND NOW, this 16th day of April, 2004, upon consideration of the Appellants' Motion In Limine, the Motion is DENIED.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

DATED: **April 16, 2004**

c: **DEP Bureau of Litigation**
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PENNSYLVANIA TROUT, TROUT UNLIMITED—PENNS WOODS WEST CHAPTER and CITIZENS FOR PENNSYLVANIA'S FUTURE	:	
v.	:	**EHB Docket No. 2002-251-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ORIX-WOODMONT DEER CREEK VENTURE, Permittee	:	**Issued: April 23, 2004**

ADJUDICATION

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Board upholds the issuance of a water obstruction and encroachment permit for the construction of a mixed use commercial center because the appellants failed to demonstrate by a preponderance of the evidence that the Department abused its discretion in issuing the permit. The permittee met its burden under 25 Pa. Code § 105.18(b)(3) of rebutting the presumption that a practicable alternative exists to the proposed project that would not involve a wetland or would have less adverse impact on a wetland and other environmental resources. The evidence demonstrates that the permittee searched for a practicable off-site alternative for its proposed development and that none exists. Further, there is no evidence that any reduction in size to the

proposed project, while still keeping it a viable project, would reduce the impact to wetlands or other environmental resources on the site. The evidence demonstrates that adverse impacts to the site have been reduced to the maximum extent possible.

The Board's review of Departmental actions is *de novo*. Therefore, the Board considers the evidence anew and is not bound by prior determinations by the Department. Citations to the Board's prior decision in *Sussex I* are improper since that case was long ago overruled.

There are two aspects to the burden of proof in this appeal. First, Penn Future, as the third party appellant challenging an action of the Department, has the burden of proving by a preponderance of the evidence that the Department abused its discretion in issuing the permit. 25 Pa. Code § 1021.122(c)(3). Second, Orix-Woodmont has the burden of demonstrating under Section 105.18a(b)(3) that there are no practicable alternatives to its proposed site for the Deer Creek project, and it must rebut the presumption with reliable and convincing evidence and documentation that an alternative location does exist that will not impact wetlands.

We find that the appellants have standing to pursue this appeal since at least some of their members will be substantially, directly and immediately affected by the construction of the proposed development.

INTRODUCTION

Appellants Pennsylvania Trout, Trout Unlimited—Penns Woods West Chapter and Citizens for Pennsylvania's Future (collectively, Penn Future) seek Board revocation of the water obstruction and encroachment permit issued by the Department of Environmental Protection (Department). The permit was issued to Orix-Woodmont Deer Creek Venture (Orix-Woodmont) for the construction and development of a mixed use commercial center in Harmar Township, Allegheny County, Pennsylvania. Penn Future contends that Orix-Woodmont failed

to affirmatively demonstrate that there were no practicable alternative to the project as required by the regulations.

Judge Thomas W. Renwand presided over an eight day trial conducted from September 30, 2003 through October 14, 2003. Due to a long delay in the court reporter's transcription of the proceeding, the schedule for filing post-hearing briefs was modified by the Board. The record consists of a joint stipulation, the hearing transcript of 1163 pages, and multiple exhibits. After careful and detailed review of all the evidence and the parties' post-hearing briefs, the Board makes the following:

FINDINGS OF FACT

1. The permit under appeal in this matter is Encroachment Permit E02-1350 (permit) issued by the Department of Environmental Protection ("Department") on August 22, 2002 to Orix-Woodmont Deer Creek Venture. (Joint Stipulation, ¶ 1)

2. The Department is the agency with the duty and authority to administer and enforce the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, No. 325, *as amended*, 32 P.S. §§ 693.1 - 693.27 ("Encroachments Act"); The Clean Streams Law, Act of June 22, 1937, P.L. 1987, No. 394, *as amended*, 35 P.S. §§ 691.1691.1001 ("Clean Streams Law"); the Flood Plain Management Act, the Act of October 4, 1978, P.L. 851, *as amended*, 32 P.S. §§ 679.101-679.601 ("Flood Plain Management Act"); Section 1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17 ("Administrative Code"); and the rules and regulations promulgated thereunder. (Joint Stipulation, ¶ 43)

3. Application for the permit was made on July 25, 2001, and was a Joint Permit Application to both the Department and the United States Army Corp of Engineers (hereinafter

"July 2001 Application" or "Second permit application"). (Joint Stipulation, ¶ 2)

4. The Department is the agency with the duty and authority to administer and issue Water Obstruction and Encroachment Permits ("encroachment permits"), to developers seeking to impact wetlands, waters of the Commonwealth, and other aquatic resources. (Joint Stipulation, ¶ 44)

5. The property in question is located in Harmar Township, Allegheny County and is bordered on the east by the Pennsylvania Turnpike, on the south by Route 28 and is bisected by State Route 910. (Joint Stipulation, ¶ 3)

6. Citizens for Pennsylvania's Future, Pennsylvania Trout Unlimited, and Penns Woods West Chapter of Trout Unlimited (collectively "Penn Future") are the Appellants in this appeal challenging the Department's issuance of the permit to Orix-Woodmont. (Joint Stipulation, ¶ 45)

7. On August 22, 2002, the Department issued the permit to Orix-Woodmont. On September 14, 2002, the Pennsylvania Bulletin published notice of the permit. (Joint Stipulation, ¶ 4)

8. Orix-Woodmont had previously applied for an encroachment permit on the same property; which application proposed 6.17 acres of wetland encroachment and the relocation of approximately 2,700 feet of Deer Creek. (Joint Stipulation, ¶ 5)

9. On October 12, 2000, the Department denied the first permit application. Orix-Woodmont filed an appeal with the Environmental Hearing Board at Docket No. 2000-237-R, in which Appellants intervened. The matter was settled by a Stipulation for Settlement, in light of Orix-Woodmont's July 25, 2001 new permit application submission for a revised project. (Joint Stipulation, ¶ 6)

10. On or about July 25, 2001, Orix-Woodmont submitted to the Department the second permit application which included an Alternatives Analysis, Addendum No. 3, and other submissions pertaining to Orix-Woodmont's selection of its final design alternative. (Joint Stipulation, ¶ 7)

11. The new application filed on July 25, 2001 incorporated by reference portions of the original application. (Joint Stipulation, ¶ 8)

12. Addendum Number 2 to the July 2001 application reproduced and included copies of significant portions of the original application which were being relied upon in the new application. (Joint Stipulation, ¶ 9)

13. In both its first and second permit applications, Orix-Woodmont contended that all of the various commercial components of its proposed project were essential to creating the "synergy" necessary for the development to succeed and were therefore essential to its basic purpose. (Joint Stipulation, ¶ 10)

14. Early site plans also included residential development. (Joint Stipulation, ¶ 11)

15. The second permit application did not include a movie theatre, a storage facility or residential development. (Joint Stipulation, ¶ 12)

16. Orix-Woodmont claimed that to be viable a site must have access to and be visible from a major roadway like Route 28. (Joint Stipulation, ¶ 13)

17. As part of its alternatives analysis, Orix-Woodmont evaluated 30 sites within one mile of Route 28 from Fox Chapel to Tarentum, a distance of approximately 10 miles. (Joint Stipulation, ¶ 14)

18. These sites had been evaluated as part of the first permit application and were evaluated again as part of the July 2001 application. (Joint Stipulation, ¶ 15)

19. Prior to July 25, 2001 the Department held pre-application meetings with Orix-Woodmont to discuss potential alternative site plans. Changes were made to potential site plans before the application was submitted, as a result of those meetings. (Joint Stipulation, ¶ 16)

20. During the course of the Department's review of the application it issued numerous review letters. (Joint Stipulation, ¶ 17)

21. During the review of the application, the Department also held meetings with the applicant to discuss additional information the Department required. (Joint Stipulation, ¶ 18)

22. On July 16, 2002 the United States Army Corp of Engineers issued its Encroachment Permit for the same project along with an environmental assessment document. (Joint Stipulation, ¶ 19)

23. The appeal in this action was timely filed with the Board on October 15, 2002 and an amended notice of appeal was filed on November 25, 2002. (Joint Stipulation, ¶ 20)

24. This permit issuance occurred almost two years after the Department denied Orix-Woodmont's prior permit application, No. E02-1284. (Joint Stipulation, ¶ 21)

25. At the time that the Woodmont Corporation entered into the Agreement of Sale, the McCrady property was zoned for commercial and industrial use. The land zoned industrial was subsequently rezoned to commercial C-3. (Joint Stipulation, ¶ 22)

26. The Department sent several review letters that raised questions regarding the alternatives analysis and the applicant provided answers to those questions. (Joint Stipulation, ¶ 23)

27. Deer Creek throughout the project area is classified as a warm-water fishery under the Department's Chapter 93 regulations, 25 Pa. Code § 93.1 *et. seq.* (Joint Stipulation, ¶ 24)

28. The wetlands on the Deer Creek site provide habitat for various species. (Joint

Stipulation, ¶ 25)

29. In 1995, prior to the formation of the Orix-Woodmont partnership, the Woodmont Corporation began to look for retail development opportunities in northeastern Allegheny County and other Western Pennsylvania submarkets. (Joint Stipulation, ¶ 26)

30. Woodmont engaged the services of Mr. Roger Edwards of C.B. Richard Ellis to assist it in finding sites for its clients. (Joint Stipulation, ¶ 27)

31. Ultimately, Woodmont built developments on the Cranberry Township site, the Crucible site in Robinson Township, and a site in State College. (Joint Stipulation, ¶ 28)

32. Woodmont also considered sites in Washington County, Greensburg and State College, Pennsylvania. (Joint Stipulation, ¶ 29)

33. Woodmont considered sites of various sizes. (Joint Stipulation, ¶30)

34. The site Woodmont considered in Cranberry Township was 83 acres. (Joint Stipulation, ¶ 31)

35. In July 1995, Woodmont met with Mr. Rick Stern, the owner of a tract of land in O'Hara Township across from the Waterworks Mall, to discuss the possible purchase of that property. (Joint Stipulation, ¶ 32)

36. Woodmont developed a site plan, supporting documentation and market evaluation for the O'Hara Township site, proposing a development to be called "Riverside Marketplace," consisting of 234, 665 square feet of retail space and an outparcel. (Joint Stipulation, ¶ 33)

37. Woodmont attended three or four meetings with officials of O'Hara Township concerning the proposed Riverside Marketplace document. (Joint Stipulation, ¶ 34)

38. In May/June 1996, consideration of the O'Hara Township site ended due, at least in part, to O'Hara Township's opposition to the project. (Joint Stipulation, ¶ 35)

39. Woodmont continued to look for commercial sites in the Pittsburgh region for its other retail store clients. (Joint Stipulation, ¶ 36)

40. Mr. Edwards' firm, CB Richard Ellis, represented the owner of the Deer Creek site, and held the exclusive listing for the property. (Joint Stipulation, ¶ 37)

41. In July 1997, Woodmont signed a Purchase and Sales Agreement with W.D. McCrady Land Limited Partnership for the purchase of the Deer Creek site in Harmar Township. (Joint Stipulation, ¶ 38)

42. In July 1998, Woodmont and Orix executed a Joint Venture Agreement for the purpose of developing the Deer Creek site. (Joint Stipulation, ¶ 39)

43. The current landowner, W.D. McCrady, will become a partner in the development if it is built. (Joint Stipulation, ¶ 40)

44. Orix-Woodmont's proposed highway improvements to provide access for this project will not require the purchase or condemnation of surrounding commercial and residential properties owned by third parties. (Joint Stipulation, ¶ 41)

45. The final site plans were submitted to the Department on August 8, 2002 and provide for the toe of fill slopes to be 120 feet or more from the stream in portions of the project area. (Joint Stipulation, ¶ 42)

46. Mr. Donald Orlowski resides in New Kensington, Pennsylvania. He lives 8-10 miles from the proposed Deer Creek development which is a 15 minute drive by automobile. (Transcript page 31)

47. He is a teacher at Freeport Junior High School. He teaches general science. (Transcript pages 31-32)

48. He is a member of the Deer Creek Watershed Association and the Tri-County Trout

Club. (Transcript page 33)

49. Tri-County Trout requires its members to take a pledge "as an American to save and faithfully defend from waste the natural resources of my country" including "the soil, the water, the minerals, plants and wildlife." (Transcript page 34)

50. When the Department issued the permit under Appeal in this case he was a member of the Tri-County Trout Club. (Transcript page 35)

51. Mr. Orlowski was formerly president of the Tri-County Trout Club and is currently an executive director. (Transcript page 35)

52. Tri-County Trout and Mr. Orlowski have been very active in doing stream improvement work on Deer Creek to improve habitat. (Transcript page 36)

53. Tri-County Trout has worked with the Pennsylvania Fish and Boat Commission to delay the harvest on Deer Creek. (Transcript page 36)

54. Tri-County Trout has also conducted litter and trash cleanups once or twice a year on the Deer Creek watershed. (Transcript page 36)

55. Tri-County Trout has placed devices in Deer Creek to improve habitat, water flow and substrate. It has worked to maintain stream banks and reduce erosion. (Transcript page 37)

56. Mr. Orlowski often travels to Deer Creek to fish and enjoy the beauty of the area including observing wildlife. He often takes his 12 year old son with him and they both enjoy the outdoors and the Deer Creek environment. (Transcript page 38)

57. He has been fishing Deer Creek for approximately 15 years. (Transcript page 38)

58. Mr. Orlowski has caught rainbow trout, brown trout, smallmouth bass, walleye, carp, suckers, crayfish, minnows, and catfish in Deer Creek. (Transcript page 39)

59. He has fished almost the entire length of Deer Creek over the years. (Transcript page

39)

60. Mr. Orlowski has seen various animals in the Deer Creek watershed at the proposed site for the Deer Creek development including weasels, deer, hawks, raccoons, rabbits, beavers, and turkeys. (Transcript pages 48-49)

61. Mr. Orlowski enjoys the beauty, peacefulness, and tranquility of the Deer Creek watershed. (Transcript page 49)

62. Mr. Orlowski believes the development of the site will have a detrimental impact on his enjoyment of the area. (Transcript page 50)

63. Tri-County Trout Club is a member of Penn Future. (Transcript page53)

64. None of the groups Mr. Orlowski belongs to have any ownership interests in the site. (Transcript page 59)

65. Mr. Joseph Mercurio lives in Springdale, Pennsylvania which is less than four miles form the proposed Deer Creek Development. (Transcript pages 69-70)

66. Mr. Mercurio is a retired school teacher. He is a member of Trout Unlimited, the Tri-County Trout Club, and the Deer Creek Watershed Association. (Transcript page 70)

67. He has been a member of Trout Unlimited for 13 years, Tri-County Trout Club for 7 years, and Deer Creek Watershed Association for less than two years. (Transcript page 71)

68. The mission statement of Trout Unlimited is "to preserve, protect and enhance cold water fisheries, throughout the United States." (Transcript page 72)

69. Mr. Mercurio has been involved in stream restoration work for over 12 years with Trout Unlimited. (Transcript page 72)

70. Mr. Mercurio has done limited stream restoration at Deer Creek which consisted of going into the water and rolling rocks and rebarred logs together to channel water where it

should go. The goal is to prevent erosion of the banks of the stream. (Transcript page 73-74)

71. Mr. Mercurio has been an avid trout fisherman since 1960. (Transcript page 75)

72. Mr. Mercurio fishes Deer Creek approximately 12 times a year. (Transcript page 76)

73. Mr. Mercurio last fished Deer Creek a few weeks before the hearing. (Transcript page 76)

74. He usually fishes for trout in Deer Creek (Transcript page 77)

75. Mr. Mercurio has many times helped stock Deer Creek with trout. (Transcript page 78)

76. Mr. Mercurio has observed various wildlife while fishing Deer Creek including deer, snakes, blue heron, amphibians, raccoons, and turkeys. (Transcript page 79)

77. Fishing Deer Creek "gives [him] the feeling you're someplace remote when you actually aren't." (Transcript page 79)

78. The proposed development will make the experience of fishing Deer Creek far less enjoyable for Mr. Mercurio. Instead of trees above him there will be a parking lot and the creek will flow through a 290 foot culvert. (Transcript page 80)

79. He has fished Deer Creek since 1989. (Transcript page 81)

80. The area north of the turnpike bridge, where Orix-Woodmont has proposed a conservation easement, is a beautiful place. (Transcript pages 84-85)

81. Mr. Paul Brown lives approximately 20 miles from the proposed development site but is moving to O'Hara Township which is approximately 5 miles away from the proposed Deer Creek development. (Transcript page 86)

82. Mr. Brown is employed by the Allegheny Health Department as an environmental health specialist. (Transcript page 86)

83. Mr. Brown is a member of the Pennsylvania Water Environment Association, Pennsylvania Society of Ornithology, the National Audubon Society, and the Botanical Society of Western Pennsylvania. (Transcript page 88)

84. Mr. Brown has been a member of the Pennsylvania Society of Ornithology since it was founded in the late 1980s or early 1990s. (Transcript page 89)

85. The Pennsylvania Society of Ornithology fosters the study and appreciation of the birds of Pennsylvania. It seeks to promote the conservation of birds and their habitats. (Transcript page 89)

86. Mr. Brown has been a member of the National Audubon Society for 29 years. The National Audubon Society's mission is to conserve and foster natural ecosystems, focusing on birds and other wildlife for the benefit of humanity and the earth's biological diversity. (Transcript page 89)

87. Mr. Brown has been a member of the Botanical Society of Western Pennsylvania for 30 years. It encourages an interest in botany and the study of this science and an increased knowledge of plants. (Transcript page 89)

88. Mr. Brown has been a member of the Pennsylvania Water Environment Association "for 5 to 10 years." Its mission statement includes promoting public health by preserving and enhancing the global water environment. (Transcript page 90)

89. Mr. Brown first started visiting the proposed Deer Creek development site in 1999. (Transcript page 91)

90. Mr. Brown has observed numerous wildlife in the area of the site including spring peepers, mink, belted kingfishers, beavers, and American woodcocks. (Transcript page 93)

91. Mr. Brown has observed birds in the vicinity of the property from a vantage point off

the property. (Transcript page 95)

92. Mr. Brown believes the Deer Creek Development will affect the quality and quantity of the wildlife in the area as he "generally doesn't go to malls to observe wildlife." (Transcript page 95)

93. Mr. Brown has been a member of Penn Future for 5 years. (Transcript page 77)

94. The last time Mr. Brown visited the area of the proposed Deer Creek Development was the weekend before the hearing. (Transcript page100)

95. Ms. Nancy Rackham is a water pollution biologist employed by the Department of Environmental Protection. She is a biologist in the water management program, soils and waterways section. She has worked for the Department for 11 years. (Transcript page118)

96. Ms. Rackham has a Bachelor of Arts degree in biology from Slippery Rock University. (Transcript page 119)

97. Ms. Rackham's primary job responsibility is reviewing permit applications for wetland and stream encroachments. She also investigates complaints and violations related to streams and wetlands. (Transcript page 120)

98. She reviews approximately 50 encroachment permit applications a year. (Transcript page 120)

99. The Deer Creek permit application was the largest wetland encroachment reviewed by Ms. Rackham. (Transcript page 121)

100. Ms. Rackham reviewed both permit applications submitted by Orix-Woodmont. (Transcript page 121)

101. If wetland encroachment is proposed, the applicant has to provide an environmental assessment. That includes a wetland delineation, a discussion of the functions and values of the

wetland, a discussion of the impacts and how they will affect those functions and values, site plans, cross sections, a mitigation plan, and alternatives analysis. (Transcript page 123)

102. A mitigation plan is usually in narrative form in the permit application. The mitigation sets forth how impacts have been avoided, reduced or minimized. The mitigation plan should also include if necessary, a plan to compensate for the impacts. (Transcript page 127)

103. Orix-Woodmont's first permit application was denied by the Department primarily because of the stream and wetland impacts. (Transcript page 130)

104. Deer Creek is a very good quality stream and one of the few in Allegheny County capable of supporting stocked trout. (Transcript page 130)

105. In the first application, Orix-Woodmont proposed filling in 6 of the 7 wetlands on the site with only wetland number 7 remaining. (Transcript page 142)

106. The second permit application as approved by the Department will impact 5.96 acres of wetlands. (Transcript page 143)

107. Wetland number 4 will not be impacted by the second permit application as approved by the Department. (Transcript page 148)

108. One difference between the first permit application and the second permit application was that Deer Creek was no longer proposed to be relocated. (Transcript page 151)

109. Wetlands are protected by the regulations because of the many functions they perform that benefit the environment. (Transcript page 162)

110. Wetlands serve the following functions: 1) wildlife habitat; 2) flood flow alteration; 3) stormwater retention; 4) sediment retention and stabilization; 5) contaminant filtering; 6) groundwater discharge and recharge; and 7) recreation. (Transcript page 163)

111. Deer Creek is interrelated to some of the wetlands on this site. (Transcript page 164)

112. In her summary to the first permit application, Ms. Rackham concluded that the proposed impacts to the wetlands would have an adverse environmental impact because of the size and functions of the wetlands. (Transcript page 166)

113. A groundwater discharge area is where groundwater becomes surface water. (Transcript page 167)

114. Wetlands will frequently stabilize an area of groundwater discharge. Wetlands may prevent erosion in these areas. (Transcript page 167)

115. In her summary to the first permit application, Ms. Rackham discussed the replacement wetlands as follows: "The functions proposed for the replacement areas are the same as the affected wetlands. However, the contaminant removal and sediment stabilization values will be increased because of the nature of some of the discharges, and wildlife value will be reduced." (Transcript pages 169-170)

116. Contaminated water will be filtered by some of the replacement wetlands. This contaminated water will be coming from parking lots and roads in the proposed Deer Creek Development. (Transcript page 171)

117. The Deer Creek watershed is a 52 square mile drainage area. (Transcript page 187)

118. In the first permit application, Orix-Woodmont estimated that approximately 1,500 construction jobs and 2,500 permanent jobs will be created by the Deer Creek Development. (Transcript page 195)

119. Exhibit C-2 was stipulated by the Department as the Department's written findings for the first permit application. (Transcript pages197-198)

120. By their very nature written findings of the Department rely upon information the Department receives from numerous sources including the applicant, the public, consultants, and

various individuals. (Transcript page 198)

121. Ms. Rackham indicated that Orix-Woodmont selected the Deer Creek site because it served their project purpose and need. (Transcript page 199)

122. Orix-Woodmont's project purpose was to construct a large commercial mixed-use center. (Transcript page 200)

123. According to the permit application and Ms. Rackham's investigation and review, Orix-Woodmont located the proposed project at the Deer Creek site because they identified a market area they felt was underserved and through a process of elimination reviewed and rejected other sites because they did not adequately serve their project purpose and need. (Transcript page 201)

124. The Department asked extensive and detailed questions of Orix-Woodmont concerning the alternative sites analysis. (Transcript page 203)

125. Orix-Woodmont indicated to Ms. Rackham that they needed to develop a one to two million square foot regional shopping center based on requirements necessary for the tax increment financing (TIF) they were pursuing to help finance the proposed Deer Creek Development. (Transcript page 228)

126. Orix-Woodmont obtained the TIF prior to the submission of their first permit application to the Department. (Transcript page 229)

127. The Department hired an outside consultant, Mr. Peter Friday, to assist it in its review of the first permit application. (Transcript pages 231-232)

128. The Department did not limit its alternative analysis review to only sites that would have to support a development of one to two million square feet. (Transcript page 232)

129. In doing the alternatives analysis for the second permit application, Orix-Woodmont,

at the Department's request, considered sites for their development as small as 100 acres. (Transcript page 239)

130. Ms. Rackham concluded that Orix-Woodmont had rebutted the presumption that there was a practicable alternative site to their selected site and made a written finding of her conclusion. (Cmwlth. Ex. 1, page: 3; Transcript page 244)

131. Ms. Rackham accepted Orix-Woodmont's statement that they would not consider sites over mined areas where there was less than 200 feet of overburden. (Transcript page 247)

132. Ms. Rackham was not aware when she approved the second permit application that Woodmont had constructed a project in Robinson Township, Allegheny County, Pennsylvania, where they had stabilized a mine to lessen the risks of mine subsidence. (Transcript page 250)

133. Two of Orix-Woodmont's requirements were that the project have visibility from a major highway and have relatively close access to a major highway. (Transcript pages 251-252)

134. Orix-Woodmont defined the project purpose as constructing a one to two million square foot mixed-use commercial center. The size of the development was predicated on the obligations imposed by the financial requirements set forth in the Tax Incremental Financing Orix-Woodmont obtained to help finance the project. The TIF is specific to this site. (Cmwlth. Ex. 1, page: 3; Transcript page 253)

135. Orix-Woodmont evaluated approximately 30 other parcels in its alternatives analysis in the second permit application. (Transcript pages 257-258)

136. The Deer Creek Development is a mixed-use development. The mixed-uses in the second permit application consist of hotels, offices, retail, and restaurants. (Transcript page 259)

137. The Department never asked Orix-Woodmont to remove any of the specific use components of the development to "shrink the development." (Transcript page 260)

138. Orix-Woodmont contended that each use was essential to the mixed-use character of the project. (Transcript page 260)

139. The Department used excessive site costs as a basis for excluding a site as being a practicable alternative to the Deer Creek site. (Transcript page 284)

140. Ms. Rackham relied on an affidavit of Orix-Woodmont's real estate consultant, Mr. Roger Edwards, which set forth the process undertaken by Orix-Woodmont to determine the availability of various parcels. (Transcript page 293)

141. In denying Orix-Woodmont's first permit application, Ms. Rackham believed they had not explored the availability of the off-site alternatives adequately. (Transcript page 297)

142. The Department has a guidance document with regard to Chapter 105, however, Ms. Rackham did not specifically consult it when she reviewed the Orix-Woodmont permit applications. (Transcript page 307)

143. The guidance document pertains to the areas of project purpose and need and alternatives. It indicates that the Department should not be questioning the purpose and need that is presented by the Applicant. The Department reviewer does have a great deal of latitude under the guidance document in asking for alternatives to be fully explored and evaluated. (Transcript page 308)

144. The Department had several meetings with representatives of Orix-Woodmont after the denial of the first permit application but before the submittal of the second permit application. One of the key things discussed was what would satisfy the Department in terms of documentation that other parcels and properties were not available. (Transcript page 316)

145. Penn Future attended at least one of these meetings. (Transcript page 317)

146. The permit applications submitted by Orix-Woodmont were labeled Joint

Applications. This Joint Application was developed to be used jointly by the Pennsylvania Department of Environmental Protection and the United States Army Corps of Engineers so that applicants for working streams and wetlands only had to deal with one set of application forms. (Transcript page 317)

147. In this case there was a separate United States Army Corps of Engineers permit issued to Orix-Woodmont. (Transcript page 318)

148. The Department assigns both an engineer and a biologist to permit applications such as those submitted by Orix-Woodmont. The Department engineer assigned to conduct a review of various sections of the first permit application was Mr. Richard Bayer. The Department engineer assigned to conduct a review of various sections of the second permit application was Mr. Chris Kriley. (Transcript page 318)

149. Mr. Chris Kriley holds the position of Senior Civil Engineer, hydraulic, with the Soils and Waterways Section of the Department of Environmental Protection. He holds a Bachelor degree in civil engineering, is a licensed Professional Engineer, and prior to joining the Department he worked for the California Department of Transportation for over five years. (Joint Stipulation, ¶ 49)

150. Mr. Kriley reviewed all the engineering sections of the second permit application; including the hydrologic and hydrology analyses, the general site plan, and the traffic studies. (Transcript page 319)

151. The second permit application includes an Appendix P, entitled Analysis of Practical Alternatives. (Permittee Ex. 3; Transcript page 320)

152. The second permit application contains detailed information about alternative sites including information regarding ownership and availability of various parcels of land. (Permittee

Ex. 3; Transcript page 322)

153. The second permit application also included an Appendix D, entitled "Concept Plans" which was a summary and evaluation for onsite alternatives to the project being proposed by Orix-Woodmont. (Permittee Ex. 3; Transcript pages 326-327)

154. A flat pad is a building pad that is relatively flat to facilitate construction of a project. (Transcript page 328)

155. As part of the Deer Creek Development, Orix-Woodmont will construct replacement wetlands. These will be constructed on the project site in two areas on either side of Deer Creek and there is also an off-site area. (Transcript pages 331-332)

156. The Department places special conditions or prohibitions when they approve replacement wetlands regarding the use of hydric soils. If the existing wetlands have a large percentage of cattails they limit the use of these soils so as to limit the proliferation of cattails. This is because cattails are very aggressive and will outcompete other plants. The Department wants plant diversity in replacement wetlands. (Transcript pages 334-335)

157. The Deer Creek Development avoids substantially impacting Wetland 7. Wetland 7 is "probably one of the most highly functional [wetlands] on the site." (Transcript page 335)

158. There is a conservation easement or conservation area proposed by Orix-Woodmont and approved by the Department. It is upstream of the Pennsylvania Turnpike bridge. (Transcript page 336)

159. This conservation easement or conservation area includes wetlands. (Transcript page 336)

160. Orix-Woodmont in its second permit application also proposed a wetlands enhancement program whereby it will eliminate some of the invasive plant species such as

cattails and attempt to plant more beneficial plants. They also will stabilize the outlet to the wetlands because a channel was eroding which could detrimentally affect the wetlands if the erosion continues. (Transcript page 337)

161. The conservation easement or conservation area was not relevant to the Department's review of Orix-Woodmont's Alternative Analysis. (Transcript page 340)

162. The Department does not generally accept conservation easements as mitigation and the conservation easement was provided to satisfy the requirements of the United State Army Corps of Engineers. (Transcript page 340)

163. Synergy is the interaction between various components of a mixed-use development with the purpose of enhancing the development. (Transcript page 341)

164. After the terrible and tragic events of September 11, 2001 the hotel market has suffered a downturn. (Transcript page 344)

165. As part of the Deer Creek Development, the Department required Orix-Woodmont to construct bio-filtration trenches. These are green areas in the parking lots that any runoff from the parking lots will be directed. Stone lined trenches within these green areas will further filter the water. The goal of the bio-filtration trenches is to improve the quality of the storm water which often picks up oil and other debris in the runoff from the parking lots. (Transcript page 346)

166. The replacement wetlands will be designed to provide filtration of any contaminants before the water passing through the replacement wetlands enters Deer Creek. (Transcript page 346)

167. The replacement wetlands locations were proposed and approved by the Department. The Department prefers them near the stream so as to provide further protection to Deer Creek.

(Transcript page 347)

168. Another stormwater management facility is infiltration trenches which are also included in the design of the Deer Creek Development. There purpose is to improve the quality of the water form the bio-filtration trenches prior to it entering the replacement wetlands. The infiltration trenches filter the water through rock and sand. (Transcript pages 347-348)

169. Mr. Tim Dreier is the Regional Water Manager of the Southwest Regional Office of the Pennsylvania Department of Environmental Protection. (Transcript page 349)

170. Mr. Dreier has been the Regional Water Manager of the Southwest Regional Office for approximately 15 years. (Transcript page 350)

171. His job responsibilities include reviewing Chapter 105 permit applications. (Transcript page 350)

172. The Southwest Regional Office reviews approximately 110 Chapter 105 permit applications in an average year. (Transcript page 350)

173. However, the Southwest Regional Office probably only reviews somewhere between one and five Chapter 105 permit applications for large commercial developments in excess of 200 acres. (Transcript page 350)

174. Approximately 40 Chapter 105 permit applications in a typical year deal with filling in wetlands. (Transcript pages 350-351)

175. The Deer Creek Development permit application is the first permit reviewed by the Department's Southwest Regional Office that calls for filling in almost 6 acres of wetlands. (Transcript page 351)

176. Chapter 105 applications are typically reviewed as follows by the Southwest Regional Office: The application is received and date stamped by a clerk. It is logged into the

system. The Section Chief, Mr. Larry Busack, assigns it to an engineer and a biologist for review. If the permit application is incomplete, a letter is sent to the applicant indicating that the missing information needs to be provided before a review is conducted. Once the permit application is complete, both the engineer and the biologist perform a technical review. As part of that technical review, they may request additional information. Often they send parts of the application to the Pennsylvania Fish and Boat Commission for comment. Once they have their questions answered and review the comments of the Pennsylvania Fish and Boat Commission, they submit a recommendation on the application to Mr. Busack. Mr. Busack will prepare a summary and submit it to Mr. Dreier. If Mr. Dreier agrees with the recommendation of his staff he then issues an approval or a denial. (Transcript pages 351-352)

177. The summary prepared by the staff member and submitted to Mr. Busack is entitled a Record of Decision. (Transcript page 353)

178. Typically Mr. Dreier just reviews the Record of Decision in reaching his decision to issue the permit or deny the application for the permit. (Transcript page 354)

179. Mr. Dreier usually does not question the staff member's recommendations. (Transcript page 354)

180. An Alternatives Analysis is required as part of a permit application in a Chapter 105 permit if the project proposes filling in wetlands. (Transcript page 355)

181. Mr. Dreier did not personally review or evaluate the information from Orix-Woodmont in connection with the Alternatives Analysis they submitted in their second permit application. (Transcript page 362)

182. Mr. Peter Friday was hired by the Department to review the Alternatives Analysis submitted by Orix-Woodmont in their first permit application. Mr. Friday was hired to gain his

insight and thus enhance the Department's review of the application. (Transcript page 362)

183. Mr. Friday was hired because the Department was looking for additional expertise on this issue. (Transcript page 363)

184. Mr. Friday also provided expertise to the Department in evaluating the economic viability of the development proposed in the first permit application. (Transcript page 365)

185. The Department, in denying the first permit application, relied on various conclusions reached by Mr. Friday. (Transcript page 369)

186. In reviewing the second permit application, the Department concluded that some of the points raised by Mr. Friday were points that the Department need not consider in their evaluation and review of the second permit application of Orix-Woodmont. (Transcript page 376)

187. Both developers of Orix-Woodmont and the Mills Developments each informed the Department that their respective developments would have no impact on each other. Both developers, contrary to Mr. Friday's position, state that their projects were viable and that what the other party was doing did not affect their project because they catered to different needs, different shoppers, and different uses. (Transcript page 387)

188. Mr. Friday did not testify at the hearing and his opinions were not admitted or considered by the Board in reaching its decision.

189. In the summer of 2002 before the permit was approved the Department still had some reservations about approving the project and issuing the permit. (Transcript page 389)

190. The Department's reservations were basically with non-wetland issues. The reservations mainly concerned whether the development would have environmental impacts on Deer Creek. (Transcript pages 389-390)

191. Mr. Dreier disagreed with an email statement from Southwest Regional Office Director Charles Duritsa to Department of Environmental Protection Secretary David Hess dated May 31, 2002 (Appellant Ex. 66) in which he indicated that the Southwest Regional Office of the Department of Environmental Protection still had a significant concern about environmental harm from filling in the nearly 6 acres of wetlands. (Transcript page 400)

192. In an email dated June 13, 2002 from Mr. Duritsa to Secretary Hess, it is indicated that the unanimous recommendation of the technical review staff at the Southwest Regional Office of the Department of Environmental Protection was to deny the permit application. (Appellant Ex. 67; Transcript pages 402-403)

193. After this message was conveyed to the Central Office of the Department, Mr. Ken Reisinger of the Central Office became involved in the review process. (Transcript pages 403-404)

194. Mr. Dreier was not aware of Mr. Reisinger's title but indicated he was a Division Chief with oversight responsibility for the Soil and Waterways Program. (Transcript page 405)

195. This is the first instance Mr. Dreier was aware of where Mr. Reisinger became involved in the review of a Chapter 105 permit application. (Transcript page 406)

196. After receiving the Department's pre-denial letter in June, 2002, Orix-Woodmont widened the buffers along Deer Creek and upgraded the storm water management system. (Transcript page 419)

197. Mr. Patrick Phillips is President of Economic Research Associates, which has a corporate headquarters in Washington, D.C. (Transcript pages 427-428)

198. Economic Research Associates' work for real estate development companies focuses primarily on market and financial feasibility studies for new development projects. They also do

repositioning studies or examination of existing assets and potential strategies to improve their performance and they also get involved with assisting private clients in analyses that support their applications for development approvals. (Transcript pages 431-432)

199. Mr. Phillips has an undergraduate degree in landscape architecture and a Master's Degree in landscape architecture. He also has a Master's Degree in Management Finance from Syracuse University. (Transcript page 434)

200. Mr. Phillips has written numerous articles on the subject of commercial development. (Transcript page 435)

201. Mr. Phillips is a member of the Urban Land Institute. He is active on the Urban Land Institute's Development Council. (Transcript page 436)

202. Mr. Phillips is also on the advisory board of the Johns Hopkins University Institute of Real Estate. He is also an active member of the National Land Economics Honorary Society. (Transcript page 436)

203. Mr. Phillips also taught on a part-time basis at Johns Hopkins University. He taught urban economics to real estate graduate students. (Transcript page 436)

204. Mr. Phillips has been involved in various projects in Western Pennsylvania for the past several years. He first became involved with the River Life Task Force, which is a non profit organization chartered by the city and county and some major area foundations to study development patterns along the central river fronts. (Transcript page 437)

205. Most recently, Mr. Phillips has worked with the Mills Corporation on their Pittsburgh Mills Project in the Route 28 corridor. (Transcript page 438)

206. Mr. Phillips performed two assignments for the Mills Corporation. The first was a market impact study that examined the overall level of market support for their project. The

market impact study also examined the potential impacts of their Pittsburgh Mills project on other retail operations in the region. The second assignment was an alternatives analysis study that was part of the information the developer supplied to the Pennsylvania Department of Environmental Protection to secure a permit for the project. (Transcript page 438)

207. Mr. Phillips and his company completed all their work for the Pittsburgh Mills project and the Mills Corporation in January, 2003. Their work was done for a fee and they do not have a financial stake in the Pittsburgh Mills project. (Transcript page 439)

208. Mr. Phillips believes that a large scale retail development could be financially successful in the Route 28 corridor. (Transcript page 439)

209. Mills Corporation develops value-oriented super regional shopping centers which Mr. Phillips claims are distinctive in the commercial real estate market. (Transcript page 439)

210. It is distinctive because it has a combination of value-oriented tenants which in a mid-size market like Pittsburgh might only exist in the Mills Development. These value-oriented tenants include manufacturer's outlets, off-price outlets and discount tenants. They usually also have a fairly large entertainment component together with a fair amount of restaurant or food outlets. (Transcript page 440)

211. Mills Corporation has developed approximately 15 super-regional centers. (Transcript page 440)

212. Mr. Phillips is not directly involved with tenant recruitment and negotiations. (Transcript page 443)

213. Mr. Philips is not involved in the construction process itself of mixed-use commercial developments. (Transcript page 443)

214. Mr. Phillips was recognized by the Board as an expert in the areas of economic,

commercial, and retail development; particularly mixed-use retail development; financial and economic analysis, marketing and site planning. (Transcript pages 442, 445)

215. Mr. Phillips thoroughly reviewed the alternatives analysis in both permit applications submitted by Orix-Woodmont to the Pennsylvania Department of Environmental Protection. (Transcript pages 446-447)

216. A large mixed-use master planned commercial development has three essential components. One is that there needs to be at least two uses involved. The second component is that the uses need to be physically and functionally integrated, and the third is that the development needs to be developed in conformance with a master plan. (Transcript page 448)

217. The integration requires a substantial relationship between the market segments that use a mixed-use development. (Transcript page 448)

218. Mr. Phillips indicated that the purpose of Orix-Woodmont's project, as defined by Orix-Woodmont in its permit application, was to build a large mixed-use master planned commercial development in the Route 28 corridor in Allegheny County, Pennsylvania. (Transcript page 447)

219. A multi-use project contains more than one use but does not achieve physical and functional integration. (Transcript page 451)

220. Mr. Phillips would classify the retail component of the Deer Creek Development as a power center. (Transcript page 457)

221. A power center is a shopping center, typically an unenclosed shopping center that has a few distinctive characteristics. Probably the most distinctive characteristic is that it has a larger ratio of anchor stores to smaller shops. Most of these stores are "category killers" or "big boxes." (Transcript page 457)

222. A power center is in the range of 250,000 to 600,000 square feet. (Transcript pages 458-459)

223. Power centers focus on being a destination for the consumer that has a specific purpose in mind. (Transcript page 461)

224. In the last 10 years, power centers have generally outperformed most regional malls. (Transcript page 464)

225. Developers try to mitigate their risks by preleasing or preselling as much of the development space as possible before they begin construction. (Transcript page 468)

226. Mr. Phillips believes that the significant transportation improvements to Route 910 helped drive up the costs of the Deer Creek Project and consequently helped increase its size to cover those costs. (Transcript page 469)

227. Tax increment financing uses incremental tax revenue, which is tax revenue associated with a particular action. Here it is the development of a shopping center. The development of the shopping center will produce some incrementive new taxes that would not otherwise accrue to the public sector without that new shopping center. Those tax revenues are then dedicated to servicing the debt on securities, on bonds that are issued to finance a portion of the infrastructure costs. (Transcript page 471)

228. The tax increment financing dedicated to the Deer Creek Project is approximately $20 million. (Transcript page 472)

229. There are two main tests necessary to obtain tax increment financing (TIF). The first is that the project would not occur but for the TIF. This means that the TIF money is essential to its feasibility and that source of capital is not available from conventional sources. This is called the "but for" test. The second test is that the tax revenues – the incremental revenues – are new

revenues that would not have occurred except for the project. (Transcript pages 472-473)

230. Tax increment financing is common in the retail commercial industry. (Transcript page 474)

231. The Mills project had tax increment financing. (Transcript page 474)

232. Any time you are looking at a large scale retail development in Allegheny County, Pennsylvania, a TIF is usually part of the project. (Transcript page 474)

233. Mr. Phillips indicated that the criteria utilized by Orix-Woodmont in their Alternatives Analysis were logical and rational. (Transcript page 474)

234. Some of the parcels considered by Orix-Woodmont in its Alternatives Analysis were rejected because of site development costs. (Transcript page 478)

235. A development such as Deer Creek needed to be in close proximity to Route 28 as the principal corridor in this market area. However, the draw of the stores in the power center would make the Deer Crossing Development a retail destination which might "reduce its dependency on real close proximity to Route 28." (Transcript pages 479-480)

236. The Waterfront in Homestead is an example of poor access to major roads plus difficult ingress and egress that has still been successful. (Transcript pages 480-481)

237. Developers come to the Pittsburgh region because there are locations, such as the Route 28 corridor, that represent development opportunities. The area has relatively few competitors, strong demographics, and an outward movement of population to the suburbs. (Transcript page 482)

238. Orix-Woodmont is a well-qualified experienced developer. (Transcript page 488)

239. Mr. Phillips believes that both the Deer Creek Project and the Pittsburgh Mills Project can both be successful even though Pittsburgh Mills' power center will be directly

competitive with Deer Creek's power center. (Transcript page 504)

240. Both power centers need to capture a very large proportion of any future retail sales growth. They need to create market demand and capture some of the dollars that are being spent in other market corridors. (Transcript page 505)

241. There could also be a synergy and some cross-shopping opportunities between Deer Creek and Pittsburgh Mills. (Transcript page 509)

242. In the Alternatives Analysis prepared in part by Mr. Phillips' company for the Mills Corporation it was stated that there were no practicable alternatives to the site selected by the Mills Corporation which is approximately 1½ miles from the Deer Creek site. (Transcript page 519)

243. The Mills Corporation never suggested to the Department of Environmental Protection that its project framework was acceptable to a reduction in size. (Transcript page 520)

244. The primary component of the Mills project is their value retail business while the primary component of Deer Creek is their power center. (Transcript page 525)

245. The Mills project consists of a 1.2 million square foot mall coupled with an 800,00 square foot power center. (Transcript page 529)

246. Mr. Phillips indicated to Mills that Deer Creek was encountering difficulty with financing and environmental clearance. He concluded that "given that the tenant mix at Woodmont would in some cases mirror the tenant mix at a Mills value retail mall (especially the big box peripheral development) the timing and approval process of both projects is especially critical in light of these competitive factors." Therefore, a reversal by the Board of the Department's approval of Deer Creek's permit application would inure to the Mills Corporation's benefit. (Transcript page 533)

247. The bulk of the patrons that will be traveling to the Mills development will be coming from the south on Route 28. They thus will have to drive past the Deer Creek development first. (Transcript page 536)

248. Deer Creek could thus act as what is known in the business as a "traffic interceptor." A traffic interceptor is a site that diverts a consumer to another retail location. (Transcript page 539)

249. Mr. Phillips agrees that the location of the Deer Creek project on Route 28 is a significant benefit to a retail site. (Transcript page 543)

250. There is a trend in the retail industry in recent years to larger power centers such as the ones proposed by the Mills Corporation and by Orix-Woodmont. (Transcript page 544)

251. Nowhere in Mr. Phillips' expert report or his expert testimony does he specifically identify any particular alternative site that he believes would have accommodated the Deer Creek project. (Transcript page 550)

252. Mr. Phillips agrees that the Route 28 corridor is an under-retailed quadrant of the Pittsburgh retail market. (Transcript pages 550-551)

253. The Deer Creek Project would have to be roughly the size it is to successfully compete with the Mills Corporation Project. (Transcript pages 551-555)

254. Deer Creek proposes two hotels as part of its development which would have 128 rooms each. The Mills project proposes two hotels of 130 rooms each. (Transcript page 570)

255. In conducting his review of Deer Creek's Alternative Analysis, he drove the Route 28 corridor but Mr. Phillips did not specifically visit any alternative sites. (Transcript page 571)

256. Penn Future never called Thomas Bartnik, AICP, to testify at the hearing. Mr. Bartnik was listed in Penn Future's prehearing memorandum as an expert who would testify

regarding alternatives analysis and other technical areas of the permit application. Consequently, his opinions and testimony were not considered by the Board.

257. Stephen Coslik is the Chairman and CEO of the Woodmont Company. He has been the Chairman and CEO for approximately 5½ years. He has been employed by the Woodmont Company since 1980. (Transcript page 624)

258. The Woodmont Company is a commercial real estate company primarily focusing upon retail real estate developments. Woodmont has a brokerage company, a property management company, and a development arm which focuses upon the development of retail commercial real estate throughout the United States. (Transcript pages 624-625)

259. Mr. Coslik has worked in the retail commercial development field his entire adult life. He has a bachelor's degree in finance from San Diego State University and has done work towards an MBA. (Transcript pages 627-628)

260. Mr. Coslik is a member of the Urban Land Institute, Commercial Retail Council, and the International Conference of Shopping Centers. (Transcript pages 627-628)

261. Mr. Coslik was recognized by the Board as an expert in the field of commercial retail development with regard to such matters as site planning, tenant acquisition, project feasibility, financing, and economics. (Transcript page 629)

262. The Woodmont Company usually decides to develop a retail commercial project based on requests or inquiries from their retail clients. (Transcript pages 629-630)

263. Woodmont has developed several other projects in Pennsylvania, including one in Robinson Township on Steubenville Pike involving Giant Eagle, Staples, Pep Boys, and Kohls; one in State College involving a grocery store, Office Max, Pep Boys and some local shops; and one in Cranberry Township involving a Target, Lowe's Home Improvement, Kohls, Dollar

Bank, and a number of other stores. (Transcript pages 628-643)

264. Woodmont first became involved in the Pittsburgh area in 1995 and discovered that the market was under served and that many national retailers were not represented. (Transcript pages 642-643)

265. After talking to their customers and investigating the Pittsburgh market, they focused on the Upper Allegheny Valley and saw a need to develop a site somewhere between 900,000 to one million square feet of retail developable area. (Transcript pages 645-646)

266. Woodmont located the property which is the subject of this appeal through their real estate consultant, Mr. Roger Edwards, in the summer of 1996. (Transcript page 646)

267. At this point Woodmont is under agreement with the landowner to buy 243 acres of land to develop the Deer Creek Project. (Transcript page 652)

268. The approximate purchase price of the property is $9.4 million. (Transcript page 654)

269. Mr. Coslik believes that Route 910 will act as a traffic carrier and serve the access needs for the development and enhance rather than inhibit the synergies of the Deer Creek project. (Transcript page 656)

270. During the second application process Woodmont and its consultants searched diligently for a practicable alternative to the Deer Creek site. It was in Woodmont's best interests to find such a site to meet its project purpose if the site had less environmental "problems." Such a site would have allowed them to construct their power center more quickly and more economically. (Transcript page 661)

271. Following the denial of the first application, Orix-Woodmont met various times with the Department to discuss a revised Deer Creek development. Some of these meetings were

attended by Penn Future. (Transcript pages 675-679)

272. Other than a question about improving the handicap access to the reparian zone, Orix-Woodmont did not receive any suggestions or comments from Penn Future regarding Orix-Woodmont's second application for a permit for the Deer Creek Project. (Transcript pages 680-681)

273. Orix-Woodmont Deer Creek Venture is a single purpose entity formed for the development of the Deer Creek Project. "It would be affiliates of Woodmont Company and Orix Real Estate Equities, Incorporated." (Transcript page 682)

274. Mr. Coslik believes that Mills and Orix-Woodmont are competing for some of the same retailers. He believes Mills has attempted to persuade Target to abandon the Orix-Woodmont development and locate in the Mills power center. Target is a leading retailer in the industry and many other retailers follow where Target goes. (Transcript page 686)

275. Woodmont originally looked at a wide range of sites throughout Allegheny County. These sites included ones located in Monroeville, Robinson Township, Collier Township, O'Hara Township, and Mt. Lebanon. They also looked at sites in Cranberry Township, Westmoreland County, and Washington County. (Transcript pages 691-692)

276. It is projected that if the Deer Creek Project is built it will generate approximately $4 million in additional property taxes. Approximately $2.4 – $2.5 million per year will go to the TIF to service the bond indebtedness. The taxing authorities will receive approximately $1.5 - $1.6 million per year. The school district will receive approximately $900,000, the township approximately $400,000, and Allegheny County approximately $300,000. (Transcript pages 717-718)

277. The life of the TIF is anticipated to be 17 years. At the end of the 17 years, the

bonds will be paid off and the taxing authorities will receive 100 percent of the property taxes. (Transcript page 719)

278. The Deer Creek Project was as large as it was because of the project purpose. The developer felt that demand was very readily achievable and attainable and was needed in the upper Allegheny Valley. (Transcript page 722)

279. Gary A. Sheffler, Jr., is employed by Sheffler and Company which is a civil engineering and surveying firm located in Moon Township, Pennsylvania. (Transcript page 734)

280. Sheffler and Company works for private companies designing all types of residential, multi-family, single family, industrial complexes, office developments, and retail commercial. (Transcript page 734)

281. Mr. Sheffler has worked for Sheffler and Company since late 1991. (Transcript page 735)

282. From 1989-1991 he was employed by Baker Engineers. (Transcript page 735)

283. Mr. Sheffler is a registered professional engineer in the Commonwealth of Pennsylvania. (Transcript page 737)

284. Mr. Sheffler was recognized by the Environmental Hearing Board as expert in civil engineering as it relates to commercial retail development, site planning, site grading, and general site design. (Transcript page 738)

285. Balancing the earth work is a concept that involves performing earth moving activities on a parcel to change the grades to a desired elevation and shape while keeping the earth work relatively in close proximity to the work area. (Transcript page 739)

286. This concept is important for economic reasons. If the developer has to move earth to an off-site location or haul material in these costs can significantly affect the overall project

costs. (Transcript page 739)

287. Sheffler and Company were the Permittees project coordinator for the permit application. They were responsible for compiling other consultant information and preparing the documents submitted to the Department. They worked on the off-site and onsite Alternatives Analysis. They prepared the site plans and site grading plans that appear in the permit application. They prepared the hydrologic and hydrology studies in the application as well as assisted other consultants in preparing design plans such as wetlands replacement area plans. (Transcript page 740)

288. Other consultants involved in preparing the application for the permit included Mr. Pat Gavaghan of Ecotune Engineering, Mr. Ray Caruso of Tri-Line Associates, and Mr. Roger Edwards of CB Richard Ellis. (Transcript page 741)

289. Exhibit P-3 is Appendix P. Appendix P is the Analysis of Practicable Alternatives of the July 2001 joint permit application submission. (Transcript page 742)

290. As the Department reviewed the permit application Sheffler and Company coordinated responses to specific questions raised by the Department. Several meetings were held with the Department to discuss specific topics and questions raised by the Department. After the meetings, Sheffler and Company would often prepare a written response to the questions. (Transcript pages 751-752)

291. As submitted, the application called for the preservation and/or creation of a riparian buffer zone between the stream and the development. After comments from the Department, the site plans were further revised to provide for additional riparian buffer and enhanced stormwater filtration. A water quality device known as an infiltration trench was required to collect storm water runoff from the site and provide additional water quality treatment. (Ex. A-73; P-13, 14;

Transcript pages 678, 760, 828 and 972)

292. Off-site alternative areas are listed on Exhibit P-15A. After these sites were identified a field investigation of each site was performed. (Transcript page 773)

293. These field investigations were performed by Mr. Sheffler, Mr. Gavaghan and/or Mr. Rick Machak. (Trascript page 775)

294. In addition to work in the field, to evaluate the off-site alternative site areas, they also reviewed USGS maps and other maps to determine if there were any physical, identifiable features such as major utility lines, power stations, or things of that nature. (Transcript page 774)

295. Exhibit P-3 is the Analysis of Practicable Alternatives set forth in the July 2001 Permit Application. (Transcript page 776)

296. Mr. Sheffler estimated that he spent several months over both permit applications evaluating off-site alternatives. (Transcript page 776)

297. The term "flat pad" indicates the building pad area and parking areas serving a building. (Transcript page 782)

298. The first permit application contained 123 acres of flat pad development. The second permit application initially contained 114 acres of flat pad development which was reduced to 107 acres to encompass the Department's requests for additional riparian buffer areas, implementation of water quality control facilities, access road revisions, and a fifty-foot buffer between the wetland replacement area and the slope. (Transcript pages 783-784)

299. Mr. Sheffler does not consider the site development costs of this project to be extraordinary when compared with other properties or projects to be developed in the Route 28 corridor. (Transcript page 785)

300. In order to develop the flat pads extensive earth moving operations are required.

(Transcript pages 785-786)

301. Mr. Sheffler disagreed with Mr. Phillips that the area only to the left of Route 910 could be economically developed because there would be no place to dump the earth that would be necessary. Without access to the fills to the right (or east) of Route 910 the economics of the project would not make sense. (Transcript pages 786-787)

302. We find Mr. Sheffler's testimony more credible on this issue than the testimony of Mr. Phillips.

303. If you had to move the fill off-site it would cost between five and ten dollars a cubic yard as opposed to approximately two dollars a cubic yard to move material on site. He estimates that five million cubic yards of earth would have to be moved to develop only the area west of relocated Route 910. (Transcript page 787)

304. Attempting to develop only the area to the west of relocated Route 910 would add an additional $25-50 million in costs to the project because the earth would have to be hauled off-site. (Transcript page 787)

305. Mr. Patrick D. Gavaghan is an owner and senior ecologist of Ecotune Environmental Consultants (Ecotune). (Transcript page 794)

306. Ecotune is an ecological services company specializing in aquatic resources identification, mitigation, relocation and permitting. (Transcript page 795)

307. Mr. Gavaghan was recognized as an expert by the Board. (Transcript page 796)

308. In the summer of 2002, the Department's remaining concerns about the project related to non-wetland issues and related primarily to impacts to Deer Creek. No Alternatives Analysis issues remained with the Department at this time. (Transcript pages 389-390, 918-919, 974-975)

309. In response to the pre-denial letter, Orix-Woodmont made two additional submissions on August 2 and August 8, 2002. Exhibits P-13 and P-14 respectively. As a result of the Department's review of the Application, the Applicant submitted seven addenda to the Application plus two supplemental submissions on August 2, 2002 and August 8, 2002 respectively. (Ex. P-5 and 14)

310. These subsequent submissions satisfactorily addressed the Department's remaining issues. (Ex. C-1; Transcript page 919)

311. The Department prepared a detailed permit review summary that evaluated and reached conclusions on all essential elements of the application and the regulations. (Ex. C-1)

312. Mr. Duritsa's decision was not influenced by political pressure or otherwise dictated by his superiors. (Transcript pages 907, 973-974)

313. Orix-Woodmont's Alternatives Analysis (Exhibit P-3) included the accumulated work of the engineers, ecologist and real estate professionals retained to study potential alternative sites. (Transcript pages 773-776, 801-803, 818-825)

314. As part of its Alternatives Analysis the applicant evaluated 30 different sites within a corridor one mile on either side of Route 28 from Fox Chapel to Tarentum, a distance of approximately 10 miles. (Joint Stipulation #14; Ex. P-3; Transcript page 661)

315. The applicant provided extensive documentation to the Department relating to its evaluation of both the target market Exhibit P-7, (Volume 2, "Addendum 3") area and the viability of potential alternative sites. (Ex. P-3; Transcript pages 819-820)

316. The Department sent several review letters that raised questions regarding the Alternatives Analysis and the applicant provided answers to those questions. (Joint Stipulation #23; Ex. C-6: C-7; P-28; Transcript pages 1085-1087)

317. Appellants presented no evidence refuting the conclusions drawn by Orix-Woodmont in its Alternatives Analysis in Exhibit P-3 and P-7.

318. Orix-Woodmont undertook appropriate and reasonable efforts to determine whether there were available practicable alternatives to the site in question. (Ex. P-3)

319. Environmental professionals hired by Orix-Woodmont spent several months of field and office time evaluating the potential alternative sites. (Transcript pages 773-776, 801-803, 818-825)

320. The Appellant's expert, Mr. Phillips, opined that the area of the proposed Deer Creek development to the west of relocated Route 910 could be economically viable on its own. (Transcript page 465) That portion of the development represents approximately 700,000 square feet of leaseable space. (See Ex. 14A; Transcript page 586)

321. Using the floor area ratios that Mr. Phillips used, in order to develop 700,000 square feet of retail space, a parcel of approximately 100 acres would be required. (Transcript page 792)

322. The applicant used a minimum 100-acre parcel size as a screening criterion since it was determined that it could not develop a large mixed-use, master-planned commercial development on a smaller-sized parcel given the topography through the market area, the standard municipal development requirements and the need for sufficient leaseable space to pay for normal and routine infrastructure improvements. (Ex. P-3; Transcript page 238)

323. Mr. Phillips did not identify any parcels of any size that were a practicable alternative for a 700,000 square foot development. (Transcript page 550)

324. Orix-Woodmont used reasonable and prudent measures to determine the availability of properties throughout the study area. (Transcript page 1001)

325. The original application called for the encroachment on 6.17 acres of wetland. The

site plan submitted with the July 2001 Application called for an encroachment on 5.89 acres of wetland and the creation of 7.17 acres of mitigation wetland. The July 2001 application also eliminated any relocation of Deer Creek. (Ex. C-1; C-2)

326. The area bordering the north bank of Deer Creek contains 4.35 acres of wetlands and the application proposed the creation of 4.46 acres of replacement wetlands also along the north bank of Deer Creek within the flood plain of the creek. (Ex. P-14; P-14A; Transcript pages 805-806)

327. On the south bank of Deer Creek Wetland #4 is not being impacted. The project as permitted will retain that area and add an additional 1.03 acres of wetland in the same area. (Ex. P-14 (Wetland Impact Summary); Transcript pages 810-811)

328. The project was designed to minimize to the greatest extent possible the amount of encroachment onto Deer Creek Wetland #7, the largest and highest quality wetland on site. (Transcript page 355) Only 0.18 acres out of 3.75 acres is impacted. (Transcript pages 812-813)

329. The wetlands in question on the project site are of limited function and value, having been impacted by activities unrelated to this project including, but not limited to, highway construction and construction of a municipal sewer line. (Ex. E-1; Transcript pages 169-171, 334-335)

330. The replacement wetlands provided by Orix-Woodmont will provide the same or superior function and value to those being impacted as a result of the project. (Transcript pages 170-171, 334, 808-810)

331. The replacement wetlands proposed by Orix-Woodmont will provide greater wetland function than the existing wetlands on site. (Transcript pages 169-171, 807-808)

332. Due to the marginal nature of the existing wetlands on site, the Department has

prohibited Orix-Woodmont from using the hydric soils from the existing wetlands to construct new wetlands. (Transcript pages 334, 808-810)

333. As shown on the final project profiles, the development will not enclose Deer Creek in a "canyon," but rather will have substantial open riparian areas. (Ex. P-13; Appendix G (Cross Sections); Transcript pages 756-761)

334. In addition to direct wetland replacement, Orix-Woodmont, through the existing landowner, will create a 93-acre conservation easement for the benefit of the Allegheny Valley School District and the public on lands adjacent to the project site and will provide enhancements and improvements to some of the wetlands already existing in the conservation area. (Ex. P-12; Transcript pages 336, 749, 764-754)

DISCUSSION

Background

Penn Future, on October 15, 2002 appealed the Pennsylvania Department of Environmental Protection's (Department) issuance of a Water Obstruction and Encroachment Permit (permit) for Orix-Woodmont's proposed shopping center and office complex ("a mixed use commercial center" according to the permit) in Harmar Township, Allegheny County, Pennsylvania. Penn Future requests that the Board revoke the permit on the basis that it does not comply with the requirements of 25 Pa. Code Chapter 105. Penn Future contends that Orix-Woodmont failed to affirmatively demonstrate that there were no practicable alternatives to the project. It further contends that Orix-Woodmont's definition of the "basic purpose" of the project is too narrow and specific and that the Department's approval of the permit did not comply with the applicable regulations.

This litigation has been extremely hard fought. The parties, especially Penn Future and

Orix-Woodmont, engaged in numerous discovery disputes which required frequent Board intervention to resolve.[1] Soon after Penn Future's Appeal was filed Orix-Woodmont inquired in discovery as to the harm Penn Future claimed would flow from the construction of the shopping center and office complex. In answering this Interrogatory, Penn Future specifically denied any claim concerning alleged harm to Deer Creek. Their answer to the Interrogatory was unambiguous on this point.

> Interrogatory 16. State with specificity the harm that you allege will impact Deer Creek with the water obstruction and encroachment permit going into effect.
>
> *Penn Future's Response.* Appellants object to Interrogatory 16 as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Neither Appellant's Notice of Appeal [n]or Amended Notice of Appeal raise an issue concerning impact to Deer Creek.
> Exhibit –P-19.

In light of this response, together with Appellant's Notice of Appeal and Amended Notice of Appeal, the trial judge correctly ruled during the hearing that Penn Future had waived any argument that the permit and resulting construction would cause harm to Deer Creek.

Wetlands

So with this background in mind we turn to the main focus of this Appeal as aptly stated in Penn Future's Post-Hearing Brief, "this case concerns wetlands, and specifically the 'alternatives analysis' that allows wetlands to be filled only when necessary." Penn Future's Post-Hearing Brief, page 22. In fact, Penn Future sets forth clearly in its Post-Hearing Brief that it has "chosen to limit [its] appeal to the 'alternatives analysis' applicable to wetlands." *Id.* at

[1] The Board has issued six previous opinions in this case: *Pennsylvania Trout et al. v. DEP et al*, 2002 EHB 968, *Pennsylvania Trout et al. v. DEP et al*, 2003 EHB 199, *Pennsylvania Trout et al. v. DEP et al*, 2003 EHB 354, *Pennsylvania Trout et al. v. DEP et al*, 2003 EHB 590, *Pennsylvania Trout et al. v. DEP et al* 2003 EHB 622, *Pennsylvania Trout et al. v. DEP et al,*

page 22.

This Board found long ago that wetlands are an important natural resource. *Davailus v. DER*, 1991 EHB 1191, 1206-08, *aff'd.* Docket No. 1826 CD. 1991 (Pa. Cmwlth. September 4, 1992) ("*Davailus I*"). Wetlands perform a myriad of functions that enormously benefit the environment in many ways. They serve as food, cover and nesting sites for many types of animals including mammals, songbirds, hawks, owls, reptiles, and amphibians. *Davailus I* at 1207. They often better the environment by acting to filter contaminants such as acid mine runoff. They act as flood storage and provide sedimentation retention. *Livingston v. DEP*, 2000 EHB 467, 472. The regulations recognize that "wetlands are a valuable public natural resource" and set forth stringent requirements protecting them. 25 Pa. Code Section 105.17. *See also Davailus v. DEP*, EHB Docket No. 96-253-L, *slip. op.* at 19-20, 27-28, 52-53 (February 6, 2003) ("*Davailus II*") for an excellent discussion summarizing the enormous value of wetlands to Pennsylvania's environment and the statutory and regulatory framework governing permits which would affect them.

However, before turning to the seminal issues in this case, we first address the issue of Penn Future's standing which is challenged by Orix-Woodmont.

Standing

Orix-Woodmont has challenged Penn Future's standing to bring this appeal. Penn Future has already survived one challenge to its standing, brought by Orix-Woodmont in a motion for summary judgment in pre-trial proceedings. In that matter, we found that Penn Future had sufficiently demonstrated standing to proceed with their appeal. *Pennsylvania Trout et al. v. DEP et al*, 2003 EHB 622. However, because the burden of proof is different depending

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2003 EHB 652.

on when a challenge to standing is brought, we are required to reconsider Orix-Woodmont's challenge at this time. When standing is challenged in a dispositive motion, we must view it in the light most favorable to the non-moving party, in this case Penn Future, which we did in our earlier opinion. However, when standing is challenged at the hearing and in post-hearing briefs, the burden shifts to Penn Future to demonstrate by a preponderance of the evidence that it does in fact have standing. *Greenfield Good Neighbors Group, Inc. v. DEP*, 2003 EHB 555. Therefore, we shall determine whether Penn Future has met its burden of demonstrating by a preponderance of the evidence that it has standing to challenge the action on appeal.

An organization can have standing either in its own right or as a representative of its members. *Barshinger v. DEP*, 1996 EHB 849. Where an organization is acting as a representative for its members, it has standing if at least one of those individuals has been aggrieved by an action of the Department. *Chestnut Ridge Conservancy v. DEP,* 1997 EHB 45; *RESCUE Wyoming v. DER*, 1993 EHB 839.

The concept of standing was explained in *Wurth v. DEP*, 2000 EHB 155, 170-71, as follows:

> The purpose of the standing doctrine in the context of proceedings before the Board is to determine whether an appellant is the appropriate party to seek relief from an action of the Department. *Valley Creek Coalition v. DEP,* EHB Docket No. 98-228-MG (Opinion issued December 15, 1999). In order to have standing to challenge a Department action, an appellant must be "aggrieved." *Florence Township v. DEP,* 1996 EHB 282. Accordingly, an appellant must show that he has a "substantial" interest in the subject matter of the particular litigation which surpasses the common interest of all citizens in seeking compliance with the law; a "direct" interest that was harmed by the challenged action; and an "immediate" interest that establishes a causal connection between the action complained of and the injury they suffered. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975).

In other words, we must ask whether the Appellants have a special right that rises above the general interest of all citizens to challenge the Department action in question, based on what they have alleged. *Greenfield Good Neighbors, supra.*

The test for determining standing was set forth in *Giordano v. DEP*, 2000 EHB 1184, 1187:

> In order to establish standing, the appellants must prove that (1) the action being appealed has had – or there is an objectively reasonable threat that it will have – adverse effects, and (2) the appellants are among those who have been – or are likely to be – adversely affected in a substantial, direct, and immediate way [citations omitted]. . . .The second question cannot be answered affirmatively unless the harm suffered by the appellants is greater than the population at large (i.e. "substantial") and there is a direct and immediate connection between the action under appeal and the appellants' harm (i.e. causation in fact and proximate cause). . . .

2000 EHB at 1185.

Penn Future presented three witnesses on the question of standing: Donald Orlowski, Joseph Mercurio and Paul Brown. Mr. Orlowski lives eight to ten miles from the site of the proposed development. He is a member of the TriCounty Trout Club and the Deer Creek Watershed Association. TriCounty Trout Club is a member of Penn Future and was so at the time of the permit issuance. (Transcript page 53) He has fished Deer Creek for approximately 15 years and has enjoyed the aesthetics and the sight of wildlife in the area of the creek. Prior to the property being posted, he used to fish in the area of the proposed site. (Transcript pages 40-46) After the property was posted, he continued to fish the creek upstream of where the property was posted. (Transcript page 47) In addition, he has walked in the vicinity of the proposed development with his son and has seen wildlife in this area. (Transcript pages 48-49) He described the area as "conducive to having peaceful walks and enjoying...the nature, the surrounding environment, surrounding scenery." (Transcript page 49) He testified that if the

mall is not built he will continue to enjoy the area. (Transcript page 50) When asked how the construction of the mall and filling of wetlands will impact his enjoyment of the area, he testified the area would not provide the same kind of aesthetic quality as it does now and he would probably go to an area more aesthetically pleasing to fish. (Transcript pages 50-51)

Mr Mercurio lives less than four miles from the site of the proposed development. He belongs to the Arrowhead Chapter of Trout Unlimited, as well as the TriCounty Trout Club and the Deer Creek Watershed Association. In connection with his membership in Trout Unlimited, he has performed stream restoration in a limited fashion on Deer Creek. (Transcript pages 73-74) He fishes Deer Creek approximately a dozen times a year and has fished in the area of the proposed development. (Transcript pages 76-77) When asked how the building of the mall will affect his enjoyment of the area, Mr. Mercurio replied it would take away from the aesthetic value of the experience of fishing in the area. (Transcript pages 79-80) If the mall were not built, he would continue to enjoy the area. (Transcript page 80)

At the time of the hearing, Paul Brown lived approximately 20 miles from the site of the proposed development but testified he was moving into a home approximately five to six miles from the site. (Transcript page 86) He is employed as an environmental health specialist for the Allegheny County Health Department. (Transcript page 86) He is a member of a number of environmental organizations including Penn Future, the National Audobon Society and the Botanical Society of Western Pennsylvania. (Transcript pages 88, 97) He is familiar with the area of the proposed mall and has been on the site and in the vicinity of it. His interest was drawn to the site after reading about it in the Western Pennsylvania Conservancy's Natural Heritage Inventory Report. (Transcript page 91) He has seen wildlife in the area of the proposed development, including spring peepers, a frog, a mink, belted kingfishers, evidence of beaver

activity and has observed aquatic vegetation. He has heard the mating calls of woodcocks and songbirds. (Transcript page 93) If the development is not built, he will continue to visit the vicinity of Deer Creek for bird watching. (Transcript pages 95-96) If it is built, he testified that he usually does not "go to malls to observe wildlife and nature." (Transcript page 96)

As noted earlier, Penn Future must demonstrate that it will be adversely affected by the Department's granting of the permit in a substantial, direct and immediate way. *Giordano, supra.* We note initially that the Department has issued a permit that will affect six acres of wetlands. Wetlands are, in the words of the regulations, "a valuable public natural resource." 25 Pa. Code § 105.17. The value of wetlands was discussed by the Board in *Devailus v. DEP*, 2003 EHB 101 and *Livingston v. DEP*, 2000 EHB 467, 472 ("Wetlands provide many useful functions that better the environment, such as flood storage, sedimentation retention and wildlife habitats.") For purposes of determining standing, the loss of wetlands is an adverse effect. While it may be perfectly justified in light of the alternatives analysis, mitigating factors and the other regulatory criteria governing the issuance of this permit, that goes to the merits of the appeal and not to the question of standing.

The next factor to consider in determining whether Penn Future has standing is whether it or its members will be affected in a substantial, direct and immediate way by the loss of the wetlands and the development of the mixed use commercial center. Its members have testified that they fish, walk and observe wildlife and nature in the area of the proposed development. The Board has long held that the enjoyment and recreational use of a natural setting is an interest that rises to a level that confers standing. *Greenfield Good Neighbors, supra.; O'Reilly v. DEP*, 2000 EHB 723; *Belitskus v. DEP*, 1997 EHB 939, 951. The testimony of Messrs. Brown, Mercurio and Orlowski indicates that they will be substantially, directly and immediately harmed

by the conversion of six acres of wetlands to a shopping mall development. The quality of their aesthetic enjoyment and use of an area that was formerly a wetlands, but will be developed into a shopping mall, will be diminished. *See e.g., Drummond v. DEP*, 2002 EHB 413, 424 (Adverse impact to a resource used and appreciated by an appellant is sufficient to confer standing.)

The fact that the wetlands are on private property does not change our opinion. Penn Future has demonstrated that its members enjoy fishing, walking and wildlife observation in the vicinity of the site. The loss of the wetlands on the site will certainly have an effect on their enjoyment of the surrounding area. Not only have Penn Future's members visited the site of the wetlands themselves but they have enjoyed the use of the wetlands watershed. We find their testimony credible that they will not have as rewarding an experience fishing and enjoying nature in the vicinity of the proposed development as they do with the site in its current condition. *See, e.g., Blose v. DEP*, 1998 EHB 635 (Because the appellant's recreational use of the watershed is dependent on the quality of the water, he has a substantial interest in preventing any type of degradation that could affect his use of the creek in question.)

Thus, we find that Penn Future, both directly and through its members, has demonstrated that it has standing to challenge the issuance of the permit that is the subject of this appeal.

Scope of Review

Our scope of review in this matter is *de novo*. That is, we must consider the case anew and are not bound by prior determinations made by the Department. This standard was enunciated long ago by the Commonwealth Court in *Warren Sand & Gravel Co. v. Department of Environmental Resources*, 341 A.2d 556, (Pa. Cmwlth. 1975) as follows:

> [T]he Board is not an appellate body with a limited scope of review attempting to determine if DER's action can be supported by the evidence received at DER's factfinding hearing. The Board's duty is to determine if DER's action can be sustained or

> supported by the evidence taken by the Board. If DER acts pursuant to a mandatory provision of a statute or regulation, then the only question before the Board is whether to uphold or vacate DER's action. If, however, DER acts with discretionary authority, then the Board, based upon the record made before it, may substitute its discretion for that of DER.

Id. at 565. This mandate was more recently upheld by the Commonwealth Court in *Pequea Township v. Herr*, 716 A.2d 678, 686 (Pa. Cmwlth. 1998) (citing *Warren Sand & Gravel*).

As explained by Judge (now Chief Judge) Krancer in *Smedley v. DEP*, 2001 EHB 131:

> The Board does not review a matter before it on the basis of an already developed record. The Pennsylvania Legislature and the Commonwealth Court have unambiguously delineated that the Board is a judicial tribunal of *first* impression. The Board protects the procedural due process rights of persons who allege and can prove that they are adversely affected by an action of DEP, a governmental agency. Under the Environmental Hearing Board Act the Board is established as a quasi-judicial body to review appeals from DEP actions and no action of the Department adversely affecting a person shall be final until the Board has heard the appeal. 35 P.S. § 7514(c); *Fiore v. DER*, 665 A.2d 1081, 1086 (Pa. Cmwlth. 1995). The Board proceeding is the *first* instance that a party challenging a DEP action has the right to judicial-type discovery and, in turn, to present evidence so developed to an independent quasi-judicial tribunal. 35 P.S. § 7513(a), 7514(c), 25 Pa. Code § 1021.111. The Board is the *first* opportunity any party challenging a DEP action has to a full adjudicatory hearing where one can present a full case in open court with the rights to subpoena witnesses, examine and cross-examine witnesses and present oral and documentary evidence. 35 P.S. § 7514(a), (f); 25 Pa. Code § 1021.85 – 1021.98, 1021.107 – 1021. 108.

2001 EHB at 156-57. (Emphasis in original)

Standard of Review

As further explained in *Smedley*:

> Thus, a *de novo* hearing of a DEP action before the Board, as in this case, does not mean that the Board's standard of review is merely to determine whether an abuse of discretion has taken place

> in the same sense of an appellate court reviewing a full evidentiary record from a trial court. Such an overly narrow application of the meaning of our standard of review is not consistent with either the concept of a *de novo* review nor with the constitutional due process rights of appellants. Actions being heard before the Board involve a determination not just of whether the action under appeal was so egregiously wrong as to amount to being capricious or abusive, or based in partiality, prejudice, bias, ill-will, but a determination, based on the evidence we hear, whether the findings upon which DEP based its actions are correct and whether DEP's action is reasonable and appropriate and otherwise in conformance with the law.

Id. at 160.

Surprisingly, the Department cites *Sussex v. DER*, 1984 EHB 355 (*Sussex I*), as the seminal case the Environmental Hearing Board should follow in deciding whether the Department abused its discretion in issuing the permit. Not only was this standard of review specifically disavowed by the Board eighteen years ago in *Sussex v. DER*, 1986 EHB 350, 352 (*Sussex II*), but the Board in countless opinions since then has specifically and at great length set forth that *Sussex I* is bad law and should never be cited. As noted earlier, Chief Judge Krancer set forth in great detail the correct standard of review which is whether "based on the evidence we hear...DEP's action is reasonable and otherwise in conformance with the law." *Smedley*, 2001 EHB at 155-60. We hasten to add that the Board has also been guilty of incorrectly citing *Sussex I* in several decisions even after *Sussex II* was decided. Those decisions should not be read as resurrecting the standard set forth in *Sussex I.* See Judge Coleman's excellent discussion of this issue in *Harriman Coal Corp. v. DEP*, 2000 EHB 960, 961-62, n. 1. We hope this citation to *Sussex I* as setting forth the standard of review the Board should follow in this case is likewise an inadvertent error in the Department's otherwise singularly outstanding post hearing brief. To continue to argue that the Board should apply a limited standard of review employed by appellate courts *after* rather than *before* a hearing, which is the standard of review set forth in

Sussex I, is an argument that calls for the denial of the due process rights of appellants in direct contravention of the Environmental Hearing Board Act, 35 P.S. § 7514 (c), and the Pennsylvania Constitution.

Therefore, our standard of review is not that of an appellate court reviewing a full trial record; rather, we are a trial court of first impression. Rather than deferring to the factual findings made by the Department, we must make our own factual findings based on the record made at the hearing before us. If we hold that the Department's action is unreasonable, inappropriate or not in conformance with the law, then, as the reviewing body, we may substitute our discretion for the prior decision-maker, i.e. the Department. "This includes the power to modify the Department's action and to direct the Department in what is the proper action to be taken." *Pequea Township v. Herr*, 716 A.2d 678, 687 (Pa. Cmwlth. 1998).

Burden of Proof and Proceeding

As a third party challenging the Department's issuance of a permit, Appellants bear the burden of proving by a preponderance of the evidence that the Department's issuance of the permit to Orix-Woodmont was an abuse of discretion in the sense that it was unreasonable, inappropriate or not in conformance with law. 25 Pa. Code § 1021.122(c)(3); *Seder v. DEP*, 2000 EHB, 575, 584; *People United to Save Homes v. DEP*, 2000 EHB 1309, 1318.

Penn Future's objection in this appeal is that 25 Pa. Code § 105.18a(b)(3) of the regulations was not satisfied, relating to an "analysis of practicable alternatives" for the project. Section 105.18a(b)(3) reads as follows:

> (b) *Other wetlands.* Except as provided for in subsection (c), the Department will not grant a permit under this chapter for a dam, water obstruction or encroachment in, along, across or projecting into the wetland which is not an exceptional value wetland, or otherwise affecting the wetland, unless the applicant affirmatively demonstrates in writing and the Department issues a

written finding that the following requirements are met:

> (3) There is no practicable alternative to the proposed project that would not involve a wetland or that would have less adverse impact on the wetland, and that would not have other significant adverse impacts on the environment. An alternative is practicable if it is available and capable of being carried out after taking into consideration construction cost, existing technology and logistics. An area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed to fulfill the basic purpose of the proposed project shall be considered as a practical alternative.
>
> (i) It shall be a rebuttable presumption that there is a practicable alternative, not involving a wetland, to a nonwater-dependent project, and that the alternative would have less adverse impact on the wetland.
>
> (ii) To rebut the presumption, an applicant for a permit under this chapter shall demonstrate with reliable and convincing evidence and documentation and the Department will issue a written finding that the following statements are true:
>
> (A) The basic project purpose cannot be accomplished utilizing one or more other sites that would avoid, or result in less, adverse impact on the wetland.
>
> (B) A reduction in the size, scope, configuration or density of the project as proposed and alternative designs to that of the project as proposed that would avoid, or result in fewer or less severe, adverse impacts on a wetland will not accomplish the basic purpose of the project.

The burden of proof always remains on the party, here Penn Future, on whom it is originally placed. However, the burden of producing evidence may shift. *Riddle v. DEP*, 2001 EHB 221; *Easton Area Joint Sewer Authority v. DER*, 1990 EHB 1307, 1319. In this matter Penn Future points to the above regulation and argues that the Department abused its discretion by issuing the permit because it contends the presumption was not rebutted. Both the Department and Orix-Woodmont produced strong and in this case convincing evidence that the presumption was rebutted.

Alternatives Analysis

In her closing, the Department's lead counsel argued that from the Department's perspective this was absolutely the worst case an appellant could litigate because of the rigorous review conducted by the Department in this matter. We agree. First, the Department outright denied the first permit and came very close to denying the second permit. Moreover, we are convinced after hearing the testimony and reviewing the voluminous record that the permit was granted due to the sheer tenacity of Orix-Woodmont and its consultants in addressing every question the Department raised and modifying its project in countless ways to make it friendlier to the environment. The Alternatives Analysis performed by Orix-Woodmont in this matter is a textbook example of how it "should be done." We are convinced that few, if any developers, will have the patience, resources, and willpower to continue to move forward with a project impacting wetlands in the face of such relentless questions posed by the Department.

As indicated earlier, this case was especially hard fought. The Board itself provided Penn Future every opportunity to present its case that the permit should be revoked by admitting its exhibits numbered 59-76 which it never listed on its prehearing memorandum. These were most of the exhibits that Penn Future presented and which it had in its possession for many months prior to the hearing. Its counsel claimed they had not reviewed these exhibits until only days or hours before the beginning of the hearing. However, rather than seeking permission from the Board to supplement its list of exhibits it simply "sprung them" on its opponents at the hearing. This is not how our Rules envision exhibits should be admitted. More importantly, it is simply not fair. Initially over the strenuous objections of both the Department and Orix-Woodmont we reluctantly admitted the exhibits because we found no prejudice to the Department nor Orix-Woodmont because they had produced the documents and were aware of their existence. The

documents were admitted based on this important distinction and also because the Board wished to afford Penn Future every opportunity to prove its case. However, we would have been equally justified in excluding these documents for the clear violation of our prehearing rules. At the very least, we are absolutely convinced that if a site in this area of Allegheny County existed on which Orix-Woodmont could develop a similar project it would have found it because it was certainly in its best interests to find such a practicable alternative and spare itself the ordeal, including the hearing, it underwent.[2]

The issue in this case then is whether the Department's determination was correct that Orix-Woodmont rebutted the presumption that there were no practicable alternatives to their project which would avoid the destruction of nearly 6 acres of wetlands. Based on the law as set forth in the Department's own regulations there is a rebuttable presumption that there is a practicable alternative to a no-water based project that would not impact wetlands. The analysis of "practicable alternatives" or "the alternatives analysis" has two components. One is a search for other locations, i.e. off site alternatives. The second involves changes to the project on the proposed site to eliminate or reduce the impact to wetlands, i.e. on site alternatives.

A. On Site Alternatives

We will first review the on-site alternatives component of the test. The evidence shows that Orix-Woodmont did explore on site alternatives that would reduce or eliminate the project's impact on wetlands on the site. There is absolutely no evidence to suggest that any reduction in size, that would still result in a viable project, would reduce the impact to the wetlands. Moreover, in the findings checklist that is part of the Department's written findings that is part of

[2] Our last statement should not be taken as criticism of the Department's review of this project. On the contrary, the regulations require such a rigorous review when wetlands are impacted. The fact that the Department and especially Ms. Rackham and Mr. Duritsa conducted such a

Exhibit C-1, the Department found that adverse impacts to the wetlands and other environmental resources have been minimized to the maximum extent possible. As correctly pointed out by Orix-Woodmont in its reply brief, the test is not simply whether the project could be made smaller but whether by making it smaller it will reduce impacts to the wetlands. 25 Pa. Code § 105.18a(b)(3)(ii)(B). The Department's findings cross-reference the alternatives analysis.

Under the first permit application, 123 acres of flat pad development were needed. "Flat pad" refers to the building pad area and parking areas serving a building. The second permit application initially contained 114 acres of flat pad development which was reduced to 107 acres to encompass the Department's requests for additional riparian buffer areas, implementation of water quality control facilities, access road revisions and a fifty-foot buffer between the wetland replacement area and the slope.

Although it was Mr. Phillips' opinion that developing only the area to the left, or west, of Route 910 could be economically done, thereby lessening the impact on the wetlands, we find this is not economically feasible since there would be no place to dump the earth that would necessarily be removed. Moving the fill off site would cost between five and ten dollars a cubic yard, compared to two dollars a cubic yard to move material on site. Five million cubic yards of earth would need to be moved to develop the area west of Route 910. Attempting to develop only this area – i.e., the area west of Route 910 – would add an additional $25-50 million in costs to the project due to earth being moved off site. Simply stated, adopting Penn Future's proposal would result in a project that would not be economically viable and this is not a reasonable practicable alternative.

Since developing only the area to the west of Route 910 was not economically feasible,

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review shows that they did their jobs in accordance with these high standards.

the evidence indicates that Orix-Woodmont looked for and the Department required ways to reduce the impact to the wetlands on the proposed site. In its first application, Orix-Woodmont's analysis of practicable on site alternatives assessed seven conceptual plans. The evidence shows that Orix-Woodmont was not able to develop a plan that would not impact some wetland acreage and still achieve its basic purpose. It proposed Conceptual Plan No. 7, which would impact a total of 6.10 acres of wetlands.

Following its review of Conceptual Plan No. 7, the Department was not satisfied and required further work on the part of Orix-Woodmont. In its second application, Orix-Woodmont proposed five additional conceptual plans. A major difference in the additional proposals is that they do not call for the relocation of Deer Creek. Orix-Woodmont proposed Conceptual Plan 8D, which reduced wetland impacts to 5.89 acres. Orix-Woodmont was also required to provide 7.16 acres of replacement wetlands, which exceeds the minimum regulatory replacement rate of 1:1. 25 Pa. Code § 105.20a(a)(1).

Even with this submission, the Department still required more on site changes. It required Orix-Woodmont to eliminate nearly all impacts to Wetland No. 7, the best functioning wetland on the site. Orix-Woodmont was also required to provide a wildlife buffer around the largest replacement wetland. Finally, after the Department's central staff became involved in the permit review, Orix-Woodmont was required to upgrade its stormwater management plan and to install infiltration trenches, an additional stormwater control. Since the flat pad area was reduced from 123 to 107 acres, this should result in less total runoff.

Penn Future cites the case of *Mock v. DER*, 1992 EHB 537, *aff'd*, 623 A.2d 940 (Pa. Cmwlth. 1993), *aff'd*, 667 A.2d 212 (Pa. 1995), *cert. denied*, 517 U.S. 1216 (1996), in its post hearing brief. In *Mock*, the Department denied the appellant's application for a permit to fill in

.87 acres of wetlands to construct an auto maintenance facility. However, as Penn Future acknowledges in its brief, in *Mock* the Board found that nothing in the record suggested that the appellant had considered reducing the size of the project or changing it to a different use. The Board further found that the appellant's proposal to create .38 acres of replacement wetlands did not compensate for the environmental harm caused by the loss of .87 acres of wetlands.

Unlike the appellant in *Mock*, Orix-Woodmont did carefully consider and adopt a number of measures to reduce the impact to wetlands and other environmental resources on the site to a minimum. In fact, the facts of the present case are a textbook example of how an applicant should proceed when applying for a permit under which wetlands will be impacted. Orix-Woodmont's application underwent intense scrutiny by the Department and where problems in the application were encountered, Orix-Woodmont proposed and adopted measures to reduce the environmental incursion to a minimum. This was not done in *Mock*.

The evidence shows that adverse impacts to the site have been reduced to the maximum extent possible. There is absolutely no evidence in the record to demonstrate that any reduction in the size of the project, while still keeping it a viable project, could reduce the impact to wetlands or other environmental resources on the site. This refutes Penn Future's position that making the project smaller will reduce the impact to the wetlands.

B. Off-Site Alternatives

We now turn to the off-site alternatives component of the regulations. The evidence conclusively shows that Orix-Woodmont satisfied the requirements of 25 Pa. Code Section 105.18a(b)(3) by conducting an extensive "off-site" alternatives analysis.

We begin with the fact that any practicable alternatives that will rebut the regulatory presumption must meet the "basic purpose" of the project. 25 Pa. Code Section

105.18a(b)(3)(ii). As is evident from a review of both the Department's notes and correspondence and as set forth in the testimony and exhibits the Department pushed, prodded, cajoled and otherwise forced Orix-Woodmont to clearly set forth its basic project purpose and justify why it needed to be of such size. Orix-Woodmont clearly and succinctly not only articulated the project's purpose but indicated why it needed to be of such sufficient size.

Woodmont entered Western Pennsylvania at the request of one its retail clients. It discovered that the Pittsburgh area was relatively underserved and there were several national retailers who were either not present or had a minimal presence. It proceeded to investigate the market and eventually developed several retail developments.

At the same time it became convinced that the Allegheny Valley portion of the market was vastly underserved from a retail perspective. This is exactly the same conclusion reached by it competitor, The Mills Corporation, and Penn Future's expert, Mr. Phillips. It envisioned a mixed use, master planned commercial development, of approximately one million square feet. Orix-Woodmont and the Mills Corporation both subscribe to the retail theory that combining different uses, such as retail, office, and entertainment, in a single commercial center creates "synergy" between the uses and a successful development. Southwestern Pennsylvania has seen recent successful developments of this type in The Pointe at North Fayette and The Waterfront in Homestead.

Therefore, as correctly stated by the Department in its corrected post-hearing brief, the critical question in this appeal is whether or not there exists some location or locations within the upper Allegheny Valley "where Orix-Woodmont could practicably, considering availability, logistics and cost, build its desired development and cause less wetland impact, or some other practicable way, considering availability, logistics and cost, to build its desired development and

cause less wetland impact on the preferred site." Department's corrected post-hearing brief page 45.

As part of its off-site alternative analysis, Orix-Woodmont conducted an exhaustive search for other practicable alternatives that the Department just as exhaustively questioned. Orix-Woodmont's lead real estate consultant, Mr. Edwards, who has many years of experience in the Pittsburgh real estate market, personally identified the 30 parcels considered in the Alternatives Analysis. As part of its second application Orix-Woodmont provided an extensive and detailed analysis of the off-site alternatives. The Department reviewed this analysis and asked follow up questions, both in various meetings, phone conversations, and writing.

A group of consultants both compiled and investigated the Alternatives sites. This group included the commercial real estate broker, Mr. Edwards; and engineer and expert in transportation, Mr. Raymond Caruso; a biologist, Mr. Patrick Gavaghan; a construction engineer, Mr. Richard Machak; and a civil engineer, Mr. Gary Scheffler. Together these consultants spent hundreds of hours in the field and analyzing the data to determine, for one reason or another, that none of the alternatives would satisfy the basic project purpose.

Mr. Edwards personally determined each property's availability. Since many of the properties were not on the real estate market Mr. Edwards contacted the owners directly. Even though the minimum site size was 100 acres, Mr. Edwards contacted owners of properties as small as 20 acres to attempt to cobble several parcels together to create a parcel of sufficient size. Orix-Woodmont performed a detailed analysis of all 30 parcels. However, it then whittled the list down to thirteen properties and explored these in even greater detail. Each failed under or one or more of the site selection criteria. At the end of the day and after still more investigation by the Department only the McCrady site was found to be suitable for the project.

Conclusion

Not only did the Department require Orix-Woodmont to revise its site plans multiple times to reduce impacts on aquatic natural resources, including the wetlands but the acreage of the impacted wetlands was actually decreased and the largest and best functioning wetland, number 7, was protected and enhanced. The Department also required Orix-Woodmont to conduct a thorough and complete analysis of alternative sites that would eliminate or reduce wetland impacts. The analysis of alternative sites presented by Orix-Woodmont was questioned extensively by the Department and nothing was accepted at face value.

In fact, we are under distinct impression that since the Department had denied the first application it was not convinced the Orix-Woodmont would undertake the near Herculean study of alternative sites that it in fact did. The Department knew that a denial of the permit application would surely be appealed and so it made sure that every avenue was covered. To the Department's benefit it did keep an open mind during the process, especially in the later stages with strong guidance from its Southwest Regional Director, Mr. Charles Duritsa and help from its Central Office in Harrisburg.

The Chapter 105 regulations create a very high hurdle but not an impossible one. Land that may not even be presently for sale but may be acquired must be considered when evaluating practicable and available sites. However, construction costs, existing technology, logistics and other "real world" considerations must be taken into account when considering whether a site is really a practicable alternative. The "basic project purpose" is integral to this analysis. In this case, the Department correctly looked at the alternative sites through the prism of the basic project purpose of constructing a multi-use commercial center of between one million and two million square feet rather than reducing the project to a small "photohut" on an acre and a half of

property. 25 Pa. Code Section 105.18a(b)(3). *See North Pocono Taxpayers' Association v. Department of Environmental Resources*, 1994 EHB 449, 490. In other words, the universe of practicable alternatives that will rebut the presumption is limited to those that will meet the basic purpose of the project. 25 Pa. Code Section 105.18a(b)(3)(ii).

As we stated in *North Pocono Taxpayers' Association, supra,* it is not either the Department's nor the Board's role to second guess the applicant's decision to pursue the project. Therefore, the question of does Allegheny County really need another shopping and commercial venue is not properly before the Department or this Board. The focus should be on the impacts to the wetlands and practicable alternatives to the project as set forth in the application and at the hearing.

Eight separate wetlands exist on the McCrady Site. (Interestingly, Wetland 8 which was identified and considered by Ms. Rackham was created sometime between March 1999 and the issuance of the permit. The owners of the overhead utility line in the course of performing standard maintenance on the line, pushed a small amount of fill across the stream channel to facilitate equipment access. The fill remained in place causing water to impound behind it, saturating some areas, and resulting in the creation of Wetland 8.) The total acreage of these wetlands is approximately 9.7 acres of which nearly 6 acres (5.96) will be filled by the development. Some of the wetlands on the site are largely comprised of cattails which have crowded out other more desirable plants. The highest functioning wetland on the site is Wetland Number 7. Orix-Woodmont made several changes in its proposed development to eliminate all but minor impacts on this wetland. Only 0.18 of this wetland will be impacted.

As part of its mitigation efforts Orix-Woodmont will create 7.24 acres of replacement wetlands including 3 on-site wetlands and an off-site wetland consisting of 1.75 acres. Orix-

Woodmont also will develop a 93 acre conservation easement on the upstream side of the Pennsylvania Turnpike bridge. Orix-Woodmont will also attempt to enhance some of the existing wetlands in this conservation easement by eliminating some of the invasive plant species, such as cattails and promoting the development of plant diversity, through additional plantings of more desirable plants. It also will attempt to reverse some of the erosion to the outlet channel to the conservation easement. The permit also requires Orix-Woodmont to monitor Deer Creek for a period of five years after completion of the construction.

CONCLUSIONS OF LAW

1. An organization can have standing in its own right or as a representative of its members, *Barshinger v. DEP,* 1996 EHB 849.

2. In order to have standing to challenge an action, an appellant must be aggrieved by that action, i.e., he must have a substantial, direct and immediate interest in the subject matter of the litigation. *Wurth v. DEP*, 2000 EHB 155.

3. Penn Future has standing to challenge the Department's issuance of this permit because at least some of its members will be substantially, directly and immediately affected by the construction of the development that is the subject of the litigation. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975).

4. Our scope of review in this matter is *de novo*. *Warren Sand & Gravel, supra.*

5. Thus, we must consider the case anew and are not bound by prior decisions of the Department. *Id.*

6. The standard of review enunciated in Sussex I is not good law. *Harriman Coal Corp. v. DEP*, 2000 EHB 960, 961-62, n.1.

7. A de novo hearing of a Departmental action before the Board, as in this case, does not

mean that the Board's standard of review is merely to determine whether an abuse of discretion has taken place in the same sense of an appellate court reviewing a full evidentiary record from a trial court. Such an overly narrow application of the meaning of our standard of review is not consistent with either the concept of a *de novo* review nor with the constitutional due process rights of appellants. Actions being heard before the Board involve a determination not just of whether the action under appeal was so egregiously wrong as to amount to being capricious or abusive, or based in partiality, prejudice, bias, ill-will, but a determination, based on the evidence we hear, whether the findings upon which the Department based its actions are correct and whether the Department's action is reasonable and appropriate and otherwise in conformance with the law. *Smedley v. DEP*, 2001 EHB 131, 160.

8. As the party challenging the Department's issuance of the permit, Penn Future bears the burden of proving by a preponderance of the evidence that the Department's issuance of the permit was an abuse of discretion. 25 Pa. Code § 1021.122(c)(3).

9. Orix-Woodmont bears the burden of proving that there are practicable alternatives to its proposed site for the Deer Creek Project and rebutted with reliable and convincing evidence the presumption that an alternative location exists that will not impact wetlands. 25 Pa. Code § 105.18(b)(3).

10. Penn Future has waived its right to argue that the permit and resulting construction will cause harm to Deer Creek based on its answer to an interrogatory.

11. The evidence does not demonstrate that any further reduction in size to the project, while still keeping it a viable project, could reduce the impact to wetlands and other environmental resources on the site.

12. When reviewing an Encroachments Permit application to impact wetlands pursuant to 25

Pa. Code § 105.18a(b)(3) it is not necessary for the Department to probe into the validity of an applicant's decision to pursue a particular construction project or "basic purpose," or the need for the project. *North Pocono Taxpayers' Association v Department of Environmental Resources*, 1994 EHB 449, 492; 25 Pa. Code § 105.18a(b)(3).

13. The Department's review pursuant to Section 105.18a(b)(3) should focus on the wetlands, the impacts to the wetlands, and practicable alternatives. *North Pocono Taxpayers' Association v. Department of Environmental Resources*, 1994 EHB 449, 492.

14. In evaluating practicable alternatives, the Department shall take construction costs, existing technology, and logistics into account. 25 Pa. Code § 105.18a(b)(3).

15. An applicant may rebut the presumption that an alternative site exists that would have fewer wetland impacts for any non-water dependent project by demonstrating that there are no practicable off-site or on-site alternatives. 25 Pa. Code § 105.18a(b)(3)(ii).

16. Based on the evidence before the Board, the Department did not abuse its discretion, i.e., act unreasonably by concluding that there is no practicable alternative location where the Deer Creek Project could be built that would eliminate or reduce wetland impacts. 25 Pa. Code § 105.18a(b)(3)(i)-(ii).

17. Based on the evidence before the Board, the Department's conclusion that there is no practicable alternative configuration or design for the McCrady Site for the Deer Creek Project that would eliminate or further reduce wetland impacts was reasonable and in accordance with the law and therefore was not an abuse of discretion. 25 Pa. Code § 105.18a(b)(3)(i)-(ii).

18. Based on the evidence before the Board, the Department did not abuse its discretion, i.e., act unreasonably or unlawfully by concluding and finding in writing that Orix-Woodmont rebutted the presumption by demonstrating that there is no practicable alternative off-site

location or alternate design for the McCrady Site that would eliminate wetland impacts or result in less adverse wetland impacts. 25 Pa. Code § 105.18a(b)(3)(i)-(ii). *See* Exhibit C-1.

19. A written finding is not required to exactly mirror the words of the underlying statute or regulation. *People United To Save Homes v. Department of Environmental Protection*, 1999 EHB 457, 565, *aff'd* 789 A.2d 319, 329-30 (Pa. Cmwlth. 2001).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

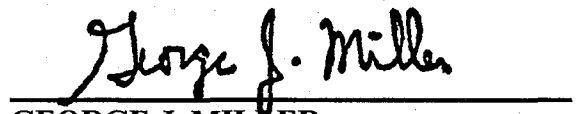
PENNSYLVANIA TROUT, TROUT UNLIMITED—PENNS WOODS WEST CHAPTER and CITIZENS FOR PENNSYLVANIA'S FUTURE	:	
v.	:	**EHB Docket No. 2002-251-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ORIX-WOODMONT DEER CREEK VENTURE, Permittee	:	

ORDER

AND NOW, this 23rd day, of April, 2004, in accordance with the foregoing Adjudication, the appeal is ***dismissed***.

ENVIRONMENTAL HEARING BOARD

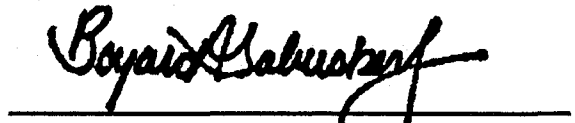
MICHAEL L. KRANCER
Administrative Law Judge
Chairman



GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member



BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: April 23, 2004

c: **DEP Bureau of Litigation**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DONALD C. RUDDY and PAUL G. MORROW	:	
	:	
v.	:	**EHB Docket No. 2003-032-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SOLEBURY TOWNSHIP, Intervenor	:	**Issued: April 27, 2004**

OPINION AND ORDER DENYING THE DEPARTMENT AND SOLEBURY'S MOTION TO PRECLUDE/MOTION IN LIMINE

By Michael L. Krancer, Chief Judge and Chairman

Synopsis:

The Department's and Solebury Township's Joint Motion To Preclude/Motion In Limine is denied as it cannot be held now that it would be illegal or impossible for Ruddy and Morrow to attempt to prove the matters which are the subject of the Motion in the manner they have suggested in their Pre-Hearing Memorandum, by the attempted use of government documents, publications, maps and regulations, and without the use of the particular experts and professionals which the Department and Solebury claim would be required.

Background and Procedural Posture

The basic background of this matter is set forth in our Opinion and Order denying Ruddy and Morrow's Motion In Limine issued on April 16, 2004 and the reader is referred to that Opinion and Order. *Ruddy Morrow v. DEP*, Docket No. 2003-032-K (Opinion issued April 16, 2004). Before us is the Department and Solebury's Joint

Motion to Preclude/Motion In Limine. Basically, the Department and Solebury seek to preclude Ruddy and Morrow from attempting to prove that: (1) the seven parcels contain steep slopes; (2) the seven parcels are, in whole or in part, located in a floodplain or floodway; (3) the seven parcels contain alluvial floodplain soils; and (4) on-lot sewage treatment would not work on the seven parcels. The Department and Solebury say that points Nos. 1, 2 and 3 could only be attempted to be proved through the testimony of an expert registered land surveyor. As to point No. 4, the Department and Solebury say that this point could only be attempted to be proved through the testimony of a registered professional land surveyor and the testimony of a professionally trained engineer with knowledge in environmental design. Ruddy and Morrow have none of the experts referred to by the Department and Solebury, or any experts for that matter. Instead, they appear to intend to try to prove these matters by using at trial various government documents, publications, maps and regulations. The Department and Solebury ask that we prohibit Ruddy and Morrow from offering any testimony or lay opinions on these "factual/technical" issues.

Discussion

In a sense we have apples and oranges here. It is not clear to us that Ruddy and Morrow intend to provide testimony on so-called "factual/technical" issues. Instead, they seem to be intent on proving the various points outlined above with a combination of government documents, publications, maps and regulations. We interpret the Department/Solebury Motion to be saying that these matters, as a matter of law, could only be attempted to be proved in a certain quite specific way which they have prescribed in their Motion. In that sense, then, we have to deny the Department/Solebury Motion.

It may turn out that what the Department and Solebury say, with the benefit of hindsight after the trial, would have been the better ways for Ruddy and Morrow to have proceeded and Ruddy and Morrow may reproach themselves later for not having done so. However, we cannot say right now that the Department and Solebury have defined the only possible ways under the law potentially available to Ruddy and Morrow to attempt to prove what they want to prove. We will take each subject matter separately as we hope we can provide some useful thoughts to all of the litigants as they prepare for trial which is scheduled to start on May 17, 2004.

Alleged presence of "steep slopes". While having an expert land survey or expert witness surveyor is one way to attempt to prove that the parcels, in whole or in part, contain steep slopes, it is not the only way to attempt to do so. We think that Ruddy and Morrow can attempt to prove that steep slopes exist on or at any or all of their properties through attempted offering of the USGS Quadrangle Map referenced in their Pre-Hearing Memorandum. There may or may not be authentication problems, we will have to see about that.[1] But, if those problems can be overcome, an argument could be made under 42 Pa.C.S.A. § 6104 that such documentation, even though hearsay, can be evidence of the facts evidenced in that documentation. We also note as a point well taken

[1] In this regard, we note from our review of the Ruddy and Morrow proposed exhibits that several of the maps or parts of maps they intend to offer do not bear any markings of a government agency or are marked by handwriting with the title of the government agency from which Ruddy and Morrow purport they come. We refer in particular to proposed Exhibits 18, 19, 20, 22 23, and 24. Exhibits 38 and 39 may also fall into this category. The Department and Solebury have noted in their pre-trial list of objections to proposed documentary evidence of Ruddy and Morrow that they do object to these documents of the basis of lack of proper authentication under Pa. R. Evid. 901. Pa. R. Evid. 901 governs authentication and Rule 901(a)(7) relates to public records or reports. That Rule requires some indicia or evidence that the document being offered as a public record is what it purports to be. Rule 902 relates to self-authentication and under subparagraph (2), a domestic public record not under seal must come with a certification that the record is what it purports to be. It remains to be seen if any of these documents can be properly authenticated.

from Ruddy and Morrow that the Department's own Sewage Facilities regulations provide that USGS topographic mapping or site determined contour lines are accepted by the Department as demonstrative of whether the soils and geology of a particular site are generally suitable for on-site sewage systems. 25 Pa. Code § 71.62(b)(2)(i). Of course, we say nothing here about the weight or credibility, if any, of such evidence if it could be admitted; just that it could, possibly, be admitted.

Also, we reject the Department and Solebury's proposition that expert testimony is needed with respect to steep slopes or that an expert land survey or surveyor is needed. The Department's own proposed Exhibit No. 6, the Field Manual for Pennsylvania Sewage Enforcement Officers, at Section I-A, discusses how one can measure the slope of a particular parcel of land or part thereof. The Manual does not suggest that a professional survey or surveyor is needed. The methods discussed do not require any professional survey or surveyor and seem well within the grasp of a non-expert. Indeed, the intended readership of the Field Manual would not seem to be surveyors. It remains to be seen at trial whether Mr. Ruddy or Mr. Morrow intend to try to testify about their having measured slope, but if they try to do so it would not seem to be precluded on the basis that an expert is needed to perform that activity.[2] What credibility, if any, might be attached to their testimony on that subject is, of course, not something that could be commented on now.

The alleged location of the parcels in a floodplain or a floodway. While having an expert land survey or expert witness surveyor is one way to attempt to prove that the parcels are, in whole or in part, in a floodplain or floodway, it is not the only way to

[2] We do note the irony that Ruddy and Morrow have announced in their pre-trial statement of objections to proposed Department exhibits that they object to the admission of the Field Manual.

attempt to do so. Ruddy and Morrow will apparently try to offer evidence of this in the form of a Federal Emergency Management Agency (FEMA) Flood Map. For the reasons outlined above involving 42 Pa.C.S.A. § 6104, it would appear that they may be able to do so. We also note as well taken, again, Ruddy and Morrow's point that the Department's own sewage program regulations specify that federal flood insurance mapping is adequate to demonstrate to it that a particular parcel of land, or a part thereof, is located in a flood prone area and, as such, is not suitable for an on-lot system. 25 Pa. Code § 73.12(a)(2). In any event, we cannot say now that Ruddy and Morrow would be absolutely required as a prerequisite to attempting to demonstrate this point that they would need to have a professionally done survey or the testimony of any other type of expert witness.

The alleged presence of alluvial and/or floodplain soils. Again, while having an expert land survey or expert witness surveyor and/or soils scientist is one way to attempt to prove that the parcels, in whole or in part, contain alluvial and/or floodplain soils, it is not the only way to attempt to do so. It appears here, again, that Ruddy and Morrow will attempt to garner evidence on this point from a United States Department of Agriculture-NRCS Soils Survey Map. It also appears that Ruddy and Morrow will try to prove this part of their case with proposed Exhibit No. 23, a two page document bearing the heading "Bucks County, Pennsylvania-Soil Map Legend." That document has potential authentication problems the nature of which we talked about in footnote No. 1. However, if this documentary material can be authenticated, then 42 Pa.C.S.A. § 6104 may, perhaps, lead to there being admissible evidence on this topic.

The allegation that on-lot sewage disposal would not work for the seven lots. At the risk of sounding repetitive, having an on-site survey by a registered professional land surveyor and the testimony of a professionally trained engineer with knowledge in environmental design is one way to attempt to prove that the seven lots in question are not suitable for on-lot sewage, but it is not the only way. Here Ruddy and Morrow apparently will try to prove this assertion with the use of various government documents and publications and maps in concert with various regulations. As we noted before, 25 Pa. Code § 73.12 provides that on-site systems are not to be allowed and the Department shall deny a permit for such a system in floodways as identified by completed Federal Flood Insurance mapping.

In conclusion, we will not preclude Ruddy and Morrow's proposed trial plan before the trial even starts.

An appropriate Order follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DONALD C. RUDDY and PAUL G. MORROW	:	
	:	
v.	:	**EHB Docket No. 2003-032-K**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and SOLEBURY TOWNSHIP,	:	**Issued: April 27, 2004**
Intervenor	:	

ORDER

AND NOW, this 27th day of April, 2004, upon consideration of the Department/Solebury Joint Motion To Preclude/Motion In Limine, the Motion is DENIED.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

DATED: **April 27, 2004**

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

EARTHMOVERS UNLIMITED, INC.	:	
	:	
v.	:	**EHB Docket No. 2003-108-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 28, 2004**

OPINION AND ORDER ON PETITION FOR RECONSIDERATION

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

A petition for reconsideration is granted regarding the Board's Order granting the Department's motion for summary judgment where Appellant had filed no response. Counsel for the Appellant obtained the consent of Department counsel to file a late response to the Department's motion for summary judgment, but neglected to request an extension from the Board. Neither the Department, nor the Department and Appellant collectively, have the authority or power to extend the deadlines for filing a response to a dispositive motion. Only the Board can grant extensions of the deadlines set forth in the Environmental Hearing Board rules of practice and procedure to file a response to a motion for summary judgment. Nevertheless, finding no prejudice to the Department and in accordance with the Board's desire to decide cases on their merits we grant the petition for reconsideration.

OPINION

This opinion addresses a petition for reconsideration filed by Earthmovers Unlimited, Inc. (Earthmovers). The Department filed a lengthy motion for summary judgment on February 4, 2004. Appellant's response was due thirty days later. On March 30, the Board dismissed Earthmovers appeal based on its failure to file a response to the Department of Environmental Protection's (Department) motion for summary judgment. Summary judgment was granted to the Department pursuant to Pa.R.C.P. 1035.3, which allows us to grant summary judgment for failure to respond.

In both a letter to the Board dated March 30, 2004 and a petition for reconsideration filed on April 8, 2004, Earthmovers asks us to reconsider our decision granting summary judgment to the Department. In both the letter and petition, Earthmovers' counsel states that he obtained an extension from the Department's counsel to March 22, 2004 to file his response and then, due to illness, obtained another extension from Department counsel to April 2, 2004 to file his response. The Department correctly points out in its Memorandum of Law that it never granted an extension to Earthmovers to file its response. Only the Board has the power and authority to grant extensions to the deadlines set forth in our rules. The Department merely indicated that it would not oppose Earthmovers' requests to the Board for extensions of time to file its response to the Department's motion for summary judgment.

The Department filed a response opposing Earthmovers' petition for reconsideration on April 22, 2004. In it, the Department's counsel states that he communicated to Earthmover's counsel that he did not object to an extension to March 26, but never gave his consent for an extension to April 2, as alleged in Earthmover's petition.

Most importantly, none of Earthmover's requests for extensions were ever communicated

to the Board. Requests for extension of time are clearly addressed in the Board's rules at 25 Pa. Code § 1021.92, dealing with procedural motions. Section (d) states that if all parties consent to the extension, the request may be embodied in a letter, rather than a motion, provided the letter indicates the consent of the other parties. However, *the request must be communicated to the Board.* Again, as correctly pointed out by the Department, neither the Department, nor the Department and Appellant collectively, have the authority to extend prehearing deadlines set forth in the Board's rules for filing responses to dispositive motions. Only the Board has this power. The consent to an extension by a party's opponent is certainly a factor the Board may consider when ruling on a request. It is not the only factor, however. And most importantly, only the Board may actually grant an extension of a deadline to file a response to a motion for summary judgment.

Here, counsel for Earthmovers failed to comply with § 1021.92. Although he obtained the consent of the Department's counsel for an extension of time, he never communicated that fact in a request for an extension to the Board. Had Earthmover's counsel's requests been communicated to the Board, the extensions likely would have been granted. However, by failing to communicate the requests to the Board, as required by our rules, there was no way the Board could have granted them, much less even been aware of counsel's need for extensions in the first place.

When a party does not file a response to a dispositive motion, especially when several weeks go by, the Board naturally assumes that the party, for one reason or another, has decided not to contest the motion. The failure to request an extension from the Board directly resulted in the granting of the Department's motion for failure to file a response pursuant to the Pennsylvania Rules of Civil Procedure.

Nonetheless, we will grant Earthmover's request for reconsideration. As noted above, had Earthmovers requested an extension from the Board, we would likely have granted it. We find no prejudice to the Department. Moreover, it is our strong belief that appeals should be decided on their merits. Since counsel for the Department had consented to Appellant counsel's request he could have simply requested the extension in a letter to us. We are surprised he did not do so. Earthmovers is cautioned to follow our rules in the future.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EARTHMOVERS UNLIMITED, INC.	:	
	:	
v.	:	**EHB Docket No. 2003-108-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 28th day of April, 2004, Earthmovers' petition for reconsideration is ***granted*** and our opinion and order of March 30, 2004 granting summary judgment to the Department is ***vacated***. Appellant shall file its response to the Department's motion for summary judgment **within two days** of the date of this Order.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administration Law Judge
Member

Thomas W. Renwand

THOMAS W. RENWAND
Administration Law Judge
Member

Michelle A. Coleman

MICHELLE A. COLEMAN
Administration Law Judge
Member

EHB Docket No. 2003-108-R

Chief Judge Michael L. Krancer and Judge Bernard A. Labuskes, Jr. are recused.

DATE: April 28, 2004

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JOHN P. NIEBAUER, JR. and DIANE A. NIEBAUER	:	
v.	:	**EHB Docket No. 2004-038-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 28, 2004**

OPINION AND ORDER ON MOTION TO STAY

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Board directs the filing of legal memoranda due to the complexity of the legal issues regarding Appellants' motion to stay proceedings because of a parallel criminal proceeding involving one of the Appellants. The Board denies the Appellants' motion to stay the Department's January 6, 2004 Order. Appellants are really requesting a supersedeas and must follow the Board's rules requesting such relief. In addition, the Board may only grant a supersedeas following a hearing.

OPINION

Presently before the Environmental Hearing Board (Board) is the Appellants,' John P. Niebauer, Jr. and Diane A. Niebauer (Appellants, or Mr. and Mrs. Niebauer, or the Niebauers), Motion to Stay further proceedings *and* stay the Department's January 6, 2004 Order based upon a pending parallel criminal prosecution of Mr. Niebauer. This Motion was file on April 9, 2004. The

Department opposes the Motion and filed its Response on April 23, 2004.

According to the Motion the Department issued an Order to Appellants on January 6, 2004 which is the subject of this Appeal before the Board. The Order alleges, *inter alia*, that Appellants are responsible for the illegal disposal of solid waste on their property. The Order also requires Appellants to take certain actions including sorting through and separating fill from solid waste allegedly buried on the site and properly disposing of the solid waste. According to the Motion, the first one thousand cubic yards must be sorted by the end of April, 2004.

On March 12, 2004, the Pennsylvania Attorney General filed a criminal complaint against Mr. Niebauer alleging criminal violations of the Solid Waste Management Act. Appellants claim that both the Department's Order and this proceeding should be stayed so as not to "undermine Mr. Niebauer's privilege against self-incrimination, expose the basis of Mr. Niebauer's defense to the prosecution in advance of criminal trial, and otherwise prejudice the case." Motion to Stay, paragraph 11.

We are always sympathetic to requests involving fundamental constitutional rights. The right to a fair criminal trial is one of our most fundamental freedoms. However, although we are certainly sympathetic to Appellants' position, we are hesitant to stay this proceeding on the basis of the sparse record before us. We realize that motions to stay are listed under the Board's rule regarding procedural motions. 25 Pa. Code § 1021.92. These types of motions do not require verification and "may not be accompanied by supporting memoranda of law unless otherwise ordered by the Board."

Unfortunately, in this case, because of the legal complexity of the issues, the parties need to file memoranda of law before the Board rules on the request for a stay of proceedings.

The second prong of Mr. and Mrs. Niebauer's Motion requests a stay of the Department's Order of January 6, 2004. The Department is correct in its contention that what the Niebauers are really asking for here is a supersedeas. Our rules are very specific and detailed as to what must be included in a petition for a supersedeas. 25 Pa. Code § 1021.62. Moreover, "the Board will not issue a supersedeas without a hearing." 25 Pa. Code § 1021.61. Appellants, if they wish, may refile their request to stay the Department's Order of January 6, 2004 in a petition for supersedeas.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN P. NIEBAUER, JR. and DIANE NIEBAUER	:	
v.	:	**EHB Docket No. 2004-038-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 28th day of April, 2004, after review of Appellants' Motion to Stay and the Department's Response, it is ordered as follows:

1) Both the Appellants and the Department shall file on or before **May 12, 2004** Memoranda of Law supporting their positions regarding the Appellants' request to stay this proceeding.

2) The Appellants' request to stay the Department's January 6, 2004 Order is ***denied without prejudice***. Appellants may refile such request in a petition for supersedeas.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: April 28, 2004

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SUNOCO, INC. (R & M)	:	
	:	
v.	:	**EHB Docket No. 2002-268-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 30, 2004**

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION OF ADJUDICATION

By: Michael L. Krancer, Chief Judge and Chairman

Synopsis:

Appellant's Petition For Reconsideration of the Board's Adjudication is denied. The Appellant had sought reconsideration of various aspects of the Department's calculation of the penalty amount *via* its application of the RACT Penalty Guidance. The Board's function in an Air Pollution Control Act penalty review case is to determine, based on all the circumstances as a whole, if the penalty assessed is reasonable. We are not bound by any particular mathematical formula the Department may have used. Additionally, a penalty guidance policy is not a regulation, it is a guidance. The Board reaffirms its conclusions of the Adjudication that: (1) the Department did not commit error in its calculation of the penalty amount so as to call for our overturning its calculations in any respect; and (2) the penalty amount in this case was, in any event, reasonable, based on all the evidence heard by the Board. The Board also declines to recant a challenged Finding of Fact. A Finding of Fact in an Adjudication is not infirm merely because neither party proposed it in their post-trial briefs. As long as the finding

is supported by the record it is appropriate. 25 Pa. Code § 1021.152(a)(1) regarding reconsideration is not implicated unless the final order from which reconsideration is being requested rests upon the finding of fact which had not been proposed by either party. In this case, the challenged finding was supported by the record but, in any event, the Adjudication did not rest on the challenged finding. The Board also did not draw any inference adverse to Sunoco from a potential witness having not testified. Finally, the Board does not alter its view that Sunoco's expert witness was not credible.

Discussion

Before us is Sunoco's Petition for Reconsideration of certain aspects of our 67 page Adjudication in *Sunoco, Inc. (R&M) v. DEP*, Docket No. 2002-268-K (Opinion issued April 12, 2004). Obviously, we will not recount the details of our Adjudication here. This Opinion should be considered in conjunction with the Adjudication.

Sunoco posits six specific objections:

> (1) The Environmental Hearing Board ("the Board") erred in finding that Sunoco's purpose in delaying compliance was to obtain a financial benefit from its noncompliance, where neither party proposed such a motive as a Finding of Fact and no such motive is supported by the record.
>
> (2) The Board erred in upholding the Department of Environmental Protection's ("the Department") 10% increase of the first year's emissions-based penalty, when the Department's RACT Penalty Guidance directs that a timely initial RACT submission shall earn the company a 10% reduction in the first year's penalty.
>
> (3) The Board erred when it upheld the Department's use of Section IX of the RACT Penalty Guidance in the face of trial testimony by the Department's Director of Compliance and Enforcement and the author of the Guidance admitting that the 50% emission reduction rate presumed by the Guidance was arbitrary, did not necessarily reflect actual emissions reductions, and resulted in a fictitious emissions excedance value that was then used to calculate the emissions-based component of the penalty.

(4) The Board erred in upholding the Department's use of $800 per ton in excess of allowable instead of using the Minimal Penalty in Section V of the Guidance ($200 per ton in excess of the allowable) for the period June 1, 1996 thru May 31, 1997.

(5) The Board erred in drawing an adverse inference based on Sunoco's decision not to call Heather Chelpaty, a former Sunoco employee who worked for Mr. Rabik on the RACT submissions until 1997.

(6) The Board erred in concluding that the expert opinions of Sunoco's accounting expert, Darren Tapp, CPA/MBA, of Price WaterhouseCoopers had no credibility and were evasive.

For purposes of organization of this Opinion we treat objections 2, 3 and 4 together categorically because they relate to the particular aspects of the Penalty Guidance Policy or the application thereof. We treat the category of the three objections dealing with the Guidance Policy first and then we will deal with the other three objections.

Sunoco's Points For Reconsideration Based On Particular Aspects of the Penalty Guidance Policy Or The Application Thereof.

We start our discussion of the three particular objections which fit into this category with a reminder that what the Board does in a penalty review case is to determine, based on all the circumstances as a whole, if the penalty assessed is reasonable. We are not bound by any particular mathematical formula the Department may have used. *Keinath v. DEP*, 2003 EHB 43, 52. We do not micro-manage, or micro-super-manage as the case may be, the Department's particular application of the points of its penalty policy. Additionally, a Penalty Guidance Policy is just those things, a guidance and a policy. It is not a regulation.

The bottom line is that we determine, on the evidence presented to us, whether the penalty amount which comes to us is reasonable, regardless of the micro-details of how

the penalty amount was calculated by the Department. In this case, as we set forth in detail in our Adjudication, we determined that the methodology used by DEP was not in need of correction by us in any of its particulars. More importantly, however, we determined, on the basis of our own review of all the facts and circumstances of this case, that the penalty amount of $3,465,660 was reasonable for the reasons we described in detail in our Adjudication.

We also note that Sunoco has not raised any new arguments regarding these three points. The arguments Sunoco raises here are the same ones it highlighted throughout the pre-trial, trial and post-trial proceedings.

With that backdrop, we turn now to the particulars.

50% Emission Reduction Rate

Sunoco points out that the Department witness admitted that it is within the Department's ability and discretion to have calculated the penalty amount using actual emissions over permit allowable instead of the Guidance Policy's designation of the 50% reduction rate. Sunoco Brief at 9 *citing* Tr. 1162. This is a fact which we already knew and accounted for in the Adjudication. Sunoco's observation confirms the correctness of the reminder stated in the introductory portion of this discussion. That the Department had the discretion to calculate the penalty another way is not the issue. The issues are whether how it did so was wrong or illegal, and whether, on our review of all the evidence, was the penalty amount unreasonable under the circumstances. The answer is no to both questions.

The Board treated this question of the 50% emission rate reduction outlined in the Guidance Policy in detail in our Adjudication at pages 45 through 50. We knew at the

time of trial that Sunoco disagreed with the Department's use of the 50% emission reduction rate and we know that it now disagrees with our discussion of the matter. At this point we do not think we can add anything else to what we have already set forth just above and in our Adjudication on this subject. The Department and Sunoco, and Sunoco and the Board will have to continue to agree to disagree.

Sunoco Should Have Received A 10% Reduction In Penalty For Having Had Its RACT Proposal In On Time

We dealt with this question in detail in our Adjudication at pages 54 to 55. We do not have anything to add on this topic other than what we have said in our introduction to this section of the Opinion and what we said in our Adjudication.

DEP Should Have Used The Minimal Penalty of the Guidance For The Period of June 1, 1996 Through May 31, 1997

We dealt with this question in Findings of Fact Nos. 112 and 118 and in our discussion of the willfulness of Sunoco's course of conduct and Sunoco's lack of cooperation. Also relevant to DEP was that the Sunoco facility is located in an area of severe non-attainment for ozone. The essence of DEP's application of $800 per ton for this year in question is Sunoco's willfulness, its lack of cooperation and that the Facility is located in a severe non-attainment area for ozone, NOx being a precursor of ozone.

As we have already said, even if the Department had deviated from its Guidance, that would not necessarily be problematic because: (1) a Guidance is not a regulation; and (2) our independent review of the evidence convinced us that the penalty amount in this case was not unreasonable under the circumstances. In any event, we did not find, nor do we upon re-evaluation of the evidence in question, that the Department contravened any specific directive of the Guidance Policy.

We now turn to the other three objections raised by Sunoco.

Finding Of Fact No. 93

Sunoco objects to Finding of Fact No. 93 on the ground that that "neither side proposed that Sunoco's purpose in avoiding and delaying compliance with the RACT regulations was to obtain financial benefit from its noncompliance." Finding of Fact No. 93 states as follows:

> Sunoco deliberately avoided and delayed its compliance with the RACT regulations, as applied to Boilers No. 6 and 7, for the purpose of obtaining a financial benefit from its noncompliance.

We note that Sunoco does not take exception to the companion of Finding of Fact No. 93, Finding of Fact No. 94, which states as follows:

> Sunoco deliberately avoided complying with the 1995 Plan Approval and 1995 Compliance Permit with respect to Boilers No. 6 and 7, during the entire period from June 1996 through September 2001, for the purpose of obtaining a financial benefit from its noncompliance.

In any event, the heart of Sunoco's objection is our finding that its non-compliance was for the purpose of obtaining a financial benefit from its noncompliance. Sunoco Memorandum of Law, p. 3 (emphasis Sunoco's). It is that aspect of Finding of Fact No. 93 about which Sunoco says was not proposed by either party nor supported by the record.

A finding of fact is not infirm just because it was not proposed as such in either party's post-trial proposed findings of fact. We think that is obvious and it does not appear that Sunoco contends otherwise. The Rule regarding reconsideration which Sunoco here invokes itself provides that reconsideration could potentially be called for only where the Board's final order rests on a factual finding which neither party had proposed. 25 Pa. Code § 1021.152(a)(1). Thus, the Rules on reconsideration clearly

contemplate that the Board may make Findings of Fact which may not have been proposed by any party since it is only Findings of Fact in that category upon which the final order rests which may implicate reconsideration. As we will come back to later, this final order does not rest upon Finding of Fact No. 93.

The Board is clearly not confined to picking findings of fact only from the list that either or both parties happened to set forth in their proposed findings of fact. The Environmental Hearing Board Act states that the Board is empowered, and indeed duty-bound, to hold hearings and issue adjudications. 35 P.S. § 7524(b). Our Rules provide that, "at the conclusion of the proceedings, the Board will issue an adjudication containing a discussion, findings of fact, conclusions of law and an order. 25 Pa. Code § 1021.134. As we said, the reconsideration rule has as a premise that the Board can make findings of fact that were not set forth in particular by the parties in their post-trial briefs. Post-trial briefs with their proposed findings of fact are guides to help the Board, not mandates the four corners of which cannot be crossed. There is nothing illogical or untoward about this. Indeed, it could not be said of any trial court anywhere that it would be limited to only findings of fact that appear in the parties' post-trial briefing. Such a notion is contrary to common sense and to the role of a trial tribunal. It is the Board that makes the findings of fact based on the evidence it hears and the parties who make the proposed findings of fact. Obviously, the Board, as are all similar trial tribunals, is charged with hearing all the evidence and making its own independent findings of fact. To hold otherwise would be to transfer the statutory authority granted to the Board to make adjudications and the Board's authority under the Rules to make findings of fact to

the parties. As long as a finding of fact made by the Board is supported by the evidence, it is fair game.

We think that Finding of Fact No. 93, as well as its companion No. 94, are indeed supported by the record and in the Adjudication. The Adjudication is full of discussion and findings relating to Sunoco's willfulness and intent and we will not repeat all of that here. In particular, though, Finding of Fact No. 54 is supportive of the challenged finding. In addition, the discussion in the last paragraph of page 53 of the Adjudication supports the questioned finding of fact. Mr. Rabik's trial testimony at Tr. 778-80 and his deposition testimony on pages 89 to 96 (Ex. C-32) support the challenged finding of fact. Exhibits A-10 and A-11 also support the challenged finding of fact. We quoted Ex. A-10 in the Adjudication at page 52. Ex. A-11 is an August 8, 1996 memorandum from Mr. Rabik to Mr. Paul Gatti, the turnaround coordinator. The turnaround coordinator is the person who does the maintenance on the boilers. Ex. A-32, p. 90-91. A "turnaround" is when a piece of equipment is shut down for maintenance. *Id.* at 91. The memorandum states in relevant part as follows:

> We delivered a letter to the State regarding #7 Boiler stating that despite the relatively low cost for spud burners, the 1999 regulation they are working on would require replacing them in 1990 or 2000. Accordingly, the cost per unit emissions reduction would be increased above the $1500/ton threshold due to the shortened regulatory life of the burners.
>
> The so what of all of this is that we shouldn't plan on doing anything to #7 boiler in 1997, but may during the scheduled 1998 shutdown or will definitely have to during the 2000 scheduled shutdown.

Ex. A-11.

Mr. Rabik characterized this memorandum as meaning that Sunoco did not and should not plan to do anything to Boiler No. 7 in 1997. Tr. 779-80. Actually, that would,

of course, have to include 1996 as well. The problem with this is that Sunoco was under obligation per the 1995 Compliance Permit to comply with RACT by installing ULNB on Boiler No. 7 by May 31, 1996. Ex. A-8, Condition 7.D. The Compliance Permit required Sunoco to start its program of compliance by June 18, 1995. *Id.* Sunoco did neither, which it does not dispute.

Mr. Rabik's explained that Sunoco can shutdown a boiler at any time but if Sunoco were to do that at any time other than a scheduled turnaround time, "there's costs associated with that". Ex. 32, p. 93. He also said that you schedule turnarounds around business cycles "so that the economic effect of those shutdowns is minimized. *Id.* at 93-94. Thus, in the face of a pending legal obligation to comply with RACT on Boiler No. 7, Sunoco decided deliberately and knowingly to do nothing so as to "minimize costs". This is indeed, in part, the "clear, cold deliberateness and calculated nature to Sunoco's refusal to implement what it had been legally required to implement by the 1995 Plan Approval and Compliance Permit" that we talked about in our Adjudication. In addition, it is a clear, cold deliberateness motivated by and for the purpose, at least in part, of minimizing costs, *i.e.*, obtaining financial benefit from non-compliance. Nobody is allowed to unilaterally set the time when they will comply with pending legal requirements to a time at its convenience which they decide it costs the least. That is what Sunoco did here and that is the essence of our Findings of Fact Nos. 93 and 94.

There being no error in the finding of fact in itself, that is, the Finding is supported by the evidence of record, we see no prejudice in having made it nor grounds for retreating from it. Does the Adjudication "rest" on Finding of Fact No. 93? Does it fall if Finding of Fact No. 93 is removed? Of course not. The Finding is objectively true

as we see it, and it is legally valid in that it is supported by the evidence, but it is not pivotal. Finding of Fact No. 93 is one of 148 numbered findings of fact. Of those, many actually contain related thoughts therein so the Adjudication consists of hundreds of findings of fact. The Adjudication stands as is, *i.e.*, the penalty amount is reasonable and appropriate on the basis of the evidence presented to us, whether or not there is a Finding of Fact No. 93.[1] The record is replete with findings and discussion about Sunoco's fractiousness and willfulness. The final order in this case, and the decision we made, does not "rest" upon Finding of Fact No. 93.

Purported "Adverse Inference" From Ms. Chelpaty's Having Not Testified

Sunoco states that the Board "appears" to have drawn an adverse inference from Ms. Chelpaty's not having testified on behalf of Sunoco. The fact of the matter is that no adverse inference in this regard was made in this case. None was needed. We only made an observation, we did not draw an inference. The concrete, palpable, direct evidence which we discussed in detail in our Adjudication was legion and more than sufficient without any inference. To put it another way in illustration; one draws an inference that it snowed during the night based on having gone to sleep, seeing no snow on the ground, and awakening to find the ground covered with snow. Here, in this case, we saw it snowing. The accumulation from the storm is deep and is set forth in descriptive detail in our Adjudication.

---

[1] As a reminder, the application of the financial benefit component of the Penalty has nothing to do with the intent of the violator. Conversely, the intent of the violator has nothing to do with the application of the economic benefit component of this Penalty or any Penalty. The BEN Model is applied regardless of intent. Sunoco does not contend that the challenged Finding of Fact has any impact or relationship to the computation in this case of the economic benefit component of the Penalty. Ex. A-32, p. 1-2. The BEN Users' Manual states, "[a] defendant need not have deliberately chosen to delay compliance (for financial or other reasons), or in fact even have been aware of its noncompliance, for it to have accrued the economic benefit of noncompliance." *Id.* Thus, Sunoco's intent had nothing to do with the Department's calculation of the economic benefit component of the penalty nor our review of the economic benefit component of the penalty.

Sunoco's Protest That Its Expert, Mr. Tapp, Should Have Been Credited

Sunoco simply disagrees with our evaluation of Mr. Tapp. Though the Commonwealth Court has provided that we need not provide specific reasons why we find one witness credible and another not credible, we did explain why we found the way we did in some detail in our Adjudication. *Birdsboro v. DEP*, 795 A.2d 444, 447-48 (Pa. Cmwlth. 2002). The Supreme Court has observed this about making credibility determinations:

> The question of whether a particular witness is testifying in a truthful manner is one that must be answered in reliance upon inferences drawn from the ordinary experiences of life and common knowledge as to the natural tendencies of human nature, as well as upon observations of the demeanor and character of the witness.

Commonwealth v. Ragan, 743 A. 2d 390, 397-98 (Pa. 1999) *citing Commonwealth v. Crawford*, 553 Pa. 195, 718 A.2d 768, 772 (Pa. 1999) (*citing Commonwealth v. Seese*, 512 Pa. 439, 517 A.2d 920, 922 (Pa. 1986)) (citations omitted). In addition, the standard Pennsylvania jury instruction regarding credibility invites the finder of fact to consider the following when determining whether a witness is credible:

> (a) Was the witness able to see, hear or know the things about which he testified?
> (b) How well could the witness remember and describe the things about which he testified?
> [(c) Was the ability of the witness to see, hear, know, remember or describe those things affected by youth or old age or by any physical, mental or intellectual deficiency?]
> (d) Did the witness testify in a convincing manner? (How did he look, act and speak while testifying? Was his testimony uncertain, confused, self-contradictory or evasive?)
> (e) Did the witness have any interest in the outcome of the case, bias, prejudice or other motive that might affect his testimony?
> (f) How well does the testimony of the witness square with the other evidence in the case, including the testimony of other witnesses? (Was it contradicted or supported by the other testimony and evidence? Does it make sense?)

Pennsylvania Suggested Standard Criminal Jury Instructions § 4.17(1)(a) - (f) (material in brackets is optional). Although the material quoted above refers to the context of jury decisions on credibility, we do not think that the principles or criteria outlined are that much different with respect to Judges' determinations of credibility.

Nobody disagrees that it is the quintessential job of the finder of fact, in this case the Board, to make witness credibility determinations or that appellate courts place a virtually inviolable degree of repose in the trial court's province to do so. *See Tire Jockey Service, Inc. v. DEP*, 836 A.2d 1026, 1031 (Pa. Cmwlth. 2003)("as the fact-finder, the EHB makes all determinations of credibility and evidentiary weight")(citation omitted); *Birdsboro*, *supra* at 447 ("it is axiomatic that 'questions of resolving conflicts in the evidence, witness credibility, and evidentiary weight are properly within the exclusive discretion of the fact finding agency, and are not usually matters for a reviewing court.'" and "we do not accept invitations to reevaluate evidence and credibility determinations")(citations omitted).

In this case we used the tools available to us, including our capabilities to observe and our life experience, to come to the conclusion that was outlined in our Adjudication. That is what we are charged to do and what we must do. We saw Mr. Tapp and observed him on the witness stand for many hours. Our conclusion was based on observing the entirety of his testimony, especially during his cross-examination and the short questioning by the trial judge. To use the focus of the Standard Jury Instruction, this witness showed distinct instances where he did not remember well, or describe well, very important aspects of what he was supposed to be testifying about; did not testify in a convincing manner; looked, acted and spoke in a defensive manner; was uncertain,

confused and self-contradictory; as we have said, was evasive; his testimony did not square with the evidence in the case, *i.e.*, the facts of the case; it was contradicted by the credible testimony of Mr. Bixby, who did know the facts about which he was supposed to be testifying; and, finally, Mr. Tapp's testimony, as we described specifically in the Adjudication on pages 59 to 60, did not make sense.

Accordingly, although we recognize the fact that Sunoco does not agree with the conclusion that we reached in our Adjudication, it remains our conclusion and no alteration of it is called for.

An appropriate Order follows:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SUNOCO, INC. (R & M)	:	
	:	
v.	:	**EHB Docket No. 2002-268-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 30, 2004**

ORDER

And now this 30th day of April 2004 it is HEREBY ORDERED that the Petition for Reconsideration of Sunoco is **DENIED**.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

Dated: April 30, 2004

cc: DEP Bureau of Litigation
Attention: Brenda Houck, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ROBERT E. BAEHLER	:	
	:	
v.	:	**EHB Docket No. 2002-105-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 5, 2004**

ADJUDICATION

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis:

The Board dismisses an appeal from an order directing a landowner to either remove fill that he placed in wetlands on his property or apply for an after-the-fact permit that would allow some or all of the fill to remain in place.

FINDINGS OF FACT

1. The Department of Environmental Protection (the "Department") is the executive agency that administers and enforces the Pennsylvania Clean Streams Law, 35 P.S. § 691.1 *et seq.* ("Clean Streams Law"), the Dam Safety and Encroachments Act, 32 P.S. § 693.1 *et seq.* ("Encroachments Act"), Section 1917-A of the Administrative Code, 71 P.S. § 510-17, and the rules and regulations promulgated under those statutes. (Commonwealth Exhibit ("C.Ex.") 8 ¶ C.)[1]

2. Robert E. Baehler ("Baehler") owns real property in Silver Lake Township,

[1] The Appellant prepared a verified "Answer to Compliance Order." The parties presented that document in lieu of the stipulations normally required by the Board's prehearing order. The document was admitted in accordance with the parties' prehearing agreement as Commonwealth Exhibit 8.

Susquehanna County (the "property"). (C.Ex. 8 ¶ C; Baehler Exhibit ("B.Ex.") 1, 2, 9.)

3. Baehler intended to build a retirement home on the property. (T. 54, 72, 81-84; B.Ex. 1, 3, 4, 5, 6, 7, 8, 11.) Baehler invested time and resources in preparing the property for the construction of a retirement home. (T. 85-93.)

4. Baehler placed fill material in approximately two tenths of an acre of wetlands on his property without first having obtained a permit from the Department authorizing him to do so. (C.Ex. 8 ¶¶ D, F, H, M, O, R, S, V, Y, Z; T. 9-10, 14-16, 25, 28-29, 41-42, 62-64; C.Ex. 1, 2, 3.)

5. The fill varies in depth from between one to two feet. (T. 24, 45; C.Ex. 3.)

6. The fill was placed by a contractor employed by Baehler to do some work on a septic system on the property. Baehler instructed the contractor to grade out the property so that he could build his house. (T. 62-64, 74, 80, 81, 90.)

7. One of the contractors working on the property prior to the placement of the fill warned Baehler that he might be filling in wetlands and that he should check it out with the "environmental people." (T. 75, 95.)

8. In response to the contractor's warning, Baehler inquired of an unidentified woman at an unidentified governmental office[2] who told him "you have no problems there." (T. 75-76, 97.)

9. The Department sent Baehler a notice of violation and several letters and inspection reports, participated in several meetings with Baehler and his representatives, and otherwise engaged Baehler in a protracted effort to persuade him to apply for an after-the-fact permit or remove the fill. (C.Ex. 8 ¶¶ M, N, O, P, Q, R, S, T, U, V, W, X; T. 9-15, 17-19; C.Ex.

[2] There is some allusion in the record to the U.S. Department of Agriculture (e.g. T. 95), but no clear evidence that that was, in fact, the office that Baehler visited.

1-5.)

10. On or about April 8, 2002, the Department sent the compliance order that is the subject of this appeal to Baehler (the "compliance order"). The compliance order charges Baehler with placing fill in wetlands without first having obtained a permit. The compliance order gives Baehler two options: (1) remove the fill material and restore the wetlands to original contour, or (2) obtain a permit to allow some or all of the fill to remain in place. (C.Ex. 6.)

DISCUSSION

Baehler unlawfully placed fill in wetlands without first having obtained a permit from the Department. (Finding of Fact ("FOF") 4-6.) The Department, after a year-and-a-half effort to obtain voluntary compliance,[3] issued an order giving Baehler the choice of removing the fill or applying for an after-the-fact permit that would allow him to leave some or all of the fill in place. There is no question that the Department has met its burden of proving that Baehler violated the law and that the Department's order is a necessary, lawful, reasonable response to Baehler's violation. *Livingston v. DEP*, 2000 EHB 467, 493. Nevertheless, Baehler has raised several arguments in his post-hearing brief, which we will address in turn.

Baehler's first point is that he performed his site preparation activities in good faith and with due diligence. We believe that the record falls well short of showing a factual predicate for that claim (see, e.g., FOF 8),[4] but even if Baehler had favorable facts, his due diligence is not a

[3] The Encroachments Act authorizes orders that are "necessary to aid in the enforcement of the provisions of [the] Act." 32 P.S. § 693.20(a). It is not clear that this requirement imposes any obligation on the part of the Department to obtain voluntary compliance before issuing an order, but even if there were such an obligation, it is clear that the Department met it in this case. Indeed, it can fairly be said that the Department bent over backwards in a fruitless effort to obtain Baehler's voluntary compliance. The Department issued its first notice of the violation regarding this matter in October 2000. It was not until undergoing a protracted series of meetings, inspections, and letters that the Department issued the compliance order in April 2002.

[4] Baehler in his post-hearing brief has not provided any citations to the record in support of his proposed findings of fact and no legal citations in support of his proposed conclusions of law, as required by the

defense to the Department's compliance order. The fact that a party has performed due diligence does not preclude the Department from issuing a compliance order. The Department is not required to show that Baehler acted with wrongful intent or was negligent in order to justify the issuance of the compliance order. Baehler's state of mind and the degree of care that he exercised might be relevant in a civil penalty action, but they have no relevance here. *Leeward Construction v. DEP*, 2000 EHB 742, 762-63.

Baehler's second point is that the Department did not act quickly enough in investigating Baehler's illegal conduct. Had the Department acted more quickly, Baehler might not have committed as much damage. Under Baehler's rather contorted logic, the Department is estopped from enforcing the law. As with Baehler's first point, Baehler does not cite to any record support for the proposition that there was any untoward delay, but even if there was such a delay, Baehler's contention has no legal merit. *Whitemarsh Disposal Corporation v. DEP*, 2000 EHB 300, 339 (argument that violation should be excused because Department should have been more vigilant in discovering the violations and reporting them to the party "borders on the absurd").

Baehler's third point is that the Department did not prove that the wetlands that he filled in were "important." There is no such prerequisite to issuing a compliance order to aid in the enforcement of the Encroachments Act. The Act does not limit the permit requirement to "important" bodies of water, whatever that means. *See Livingston*, 2000 EHB at 491-92. Along the same failed lines, Baehler suggests that his encroachment was "de minimis," but offers no proof of that and cites no authority for the proposition that the Department's authority to issue orders to aid in the enforcement of the Encroachments Act is circumscribed by a "de minimis"

Board's rules. 25 Pa. Code § 1021.131(a). Putting aside the procedural violation, as a practical matter, such unsupported materials are not particularly helpful. *See PUSH v. DEP*, 1999 EHB 457, 577.

exception.[5]

Baehler's fourth point is that the Department failed to show that there were wetlands on the site. Further, if the Department showed that there were wetlands, it failed to precisely define their boundaries. Among other things, Baehler points out that the Department did not identify a prevalence of wetland plant species in the area where all of the plants had been covered up by his fill. Conceding that seven of the nine test pits showed the presence of hydric soils, Baehler states that "any inference that hydric soils exist anywhere except in the specific test pits is suspect." (Brief p. 14.)

It is the Department's view that Baehler is precluded from making this argument because he stipulated that he had placed fill in wetlands on his property. In its reply brief, the Department has labeled Baehler's effort to circumvent that stipulation as "deceitful." We must agree with the Department that presenting this argument for the first time in the post-hearing brief has come dangerously close to showing a lack of candor to the tribunal. In a series of extension requests (see DEP Reply Brief, Appendix C), Baehler's prehearing memorandum (see ¶¶ 4-7, 9-11, 16), and most importantly, Baehler's verified "Answer to Compliance Order" submitted to the Board in lieu of the stipulations required by our Pre-Hearing Order No. 2 (C.Ex. 8 ¶¶ D, F, H, M, O, R, S, V, Y, and Z), there is no legitimate question that Baehler agreed not to contest the finding in the compliance order that he had placed fill into wetlands on his property. Baehler's judicial admissions withdraw facts from issue without the need for further proof. *Zielinski v. DEP*, 2000 EHB 617, 619 n.2.

Although for this reason we hesitate to address Baehler's argument any further, we nevertheless conclude that the Department met its burden of proving that Baehler had filled in

[5] There was vague reference to a Department policy not to require replacement wetlands as a matter of enforcement discretion for wetlands losses of less than 2,178 square feet (T. 35-36), but no record or legal

wetlands. The Department's testimony in that issue was credible, and was backed up by test pits as well as that on-site observation which could be accomplished after the fact of Baehler's unlawful filling. (FOF 4, 5, 6.) The Department pointed to the original and altered contour of the land, wetland vegetation right up to the point of the fill, and the presence of hydric soils. Not surprisingly given his stipulations, Baehler presented absolutely no testimony to rebut the Department's prima facie case that he had filled in wetlands. The vague reference to an unidentified person at an unidentified governmental office that Baehler should have "no problems" falls short of proof that there were no wetlands, and in any event, was only proffered and admitted into the record to explain Baehler's course of conduct.[6] (T. 76.)

With regard to Baehler's complaint that the Department has not precisely defined the borders of the wetlands that Baehler filled in, there is no question that Baehler encroached upon wetlands. As the Department correctly points out in its brief, there is a key difference between delineating and identifying wetlands. It is not necessary for the Department to precisely delineate the boundaries of those wetlands in order to prove that there was an encroachment and that the compliance order was lawful and justified. Indeed, it is not clear why Baehler would want the Department to do the delineation. The order as we read it gives Baehler the opportunity to define the extent of the wetlands in his permit application or removal plan (subject, of course, to the Department's review and approval).

Baehler's next point is that the Department's order has resulted in a taking of his property without just compensation. Baehler's takings claim is not ripe because he has failed to pursue a permit as contemplated by the order under appeal. A takings claim is not ripe until a landowner

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citation to "de minimis" losses.

[6] In contrast, one of Baehler's own contractors warned him that he could have a problem with wetlands on the site. (FOF 7.)

follows reasonable and necessary steps to allow a regulatory agency to exercise its full discretion in considering development plans for the property, including the opportunity to grant a permit authorizing the plans. Until those ordinary processes have been followed, the full extent of the restriction on property is not known and a regulatory taking has not yet been established. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 122 S.Ct. 1465, 1488 (2002); *Palazzolo v. Rhode Island*, 121 S.Ct. 2448, 2457 (2001); *Livingston v. DEP*, 2000 EHB 467, 492.

Baehler's final point is that he has acquired a "vested right" in his *building* permit, citing *DER v. Flynn*, 344 A.2d 720 (Pa. Cmwlth. 1976), and related cases. In *Flynn*, the Court recognized that the vested right doctrine applies in certain limited circumstances where a property owner relies to its substantial detriment on a permit that is subsequently discovered to have been erroneously issued by a municipality. In such cases, the permittee's good faith reliance on the governmental approval affords him a vested right to complete the work, even if the permit was issued in error. 344 A.2d at 724-25. Whether Baehler has acquired a vested right in his building permit, however, is beside the point of this appeal. Even if Baehler has a vested right regarding his building permit, that fact does not excuse him from obtaining such other permits as are required by law. Baehler has obviously not acquired a vested right in an erroneously issued *encroachment* permit because he has neither applied for nor obtained such a permit. Baehler's reliance on *Flynn* is misplaced.

CONCLUSIONS OF LAW

1. The wetlands on the property constitute a body of water. 25 Pa. Code § 105.1.

2. The fill that Baehler placed in the wetlands constitute an encroachment. 32 P.S. § 693.3.

3. Baehler's placement of the fill (an encroachment) in the wetlands (a body of

water) without first having obtained a permit from the Department constituted a violation of the law. 32 P.S. §§ 693.6(a), 693.18, and 693.20; 25 Pa. Code § 105.11.

4. The Department acted reasonably and in accordance with the law in issuing a compliance order to Baehler directing him to either remove the fill or apply for a permit to allow some or all of the fill to remain in place. 32 P.S. § 693.20; 71 P.S. § 510-17. The order is necessary to aid in the enforcement of the provisions of the Encroachments Act. 32 P.S. § 693.20(a).

5. Baehler's failure to pursue a permit as contemplated by the compliance order precludes him from pursuing a regulatory takings claim at this time. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 122 S.Ct. 1465, 1488 (2002).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT E. BAEHLER	:	
	:	
v.	:	**EHB Docket No. 2002-105-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 5th day of May, 2004, this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: May 5, 2004

c: **DEP Bureau of Litigation:**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

WARREN COUNTY QUALITY OF LIFE COALITION	:	
	:	
v.	:	**EHB Docket No. 2003-307-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and UNITED REFINING COMPANY, Permittee	:	**Issued: May 11, 2004**

OPINION AND ORDER ON DISCOVERY MOTION

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Board denies a request to depose two out-of-state witnesses after Appellant's Response indicates one of the witnesses will be listed as an expert witness while the other witness is the proposed expert's assistant. Rule 4003.5 of the Pennsylvania Rules of Civil Procedure initially allows only written discovery of "facts known and opinions held by an expert." The Appellant's answers to expert interrogatories and/or service of expert reports are not due until May 19, 2004. The Board, "upon cause shown" may order further expert discovery including depositions. Such an order at this time is premature.

OPINION

Presently before the Board is United Refining Company's (United) Motion for leave to depose two witnesses and for the granting of a commission to take their depositions in Washington,

D.C. According to the Motion, discovery has revealed that the individuals who know the most about Appellant's objections to the permit issued to United are the two individuals United seeks to depose, Eric V. Schaeffer, and his assistant Maria Weidner, plus the original attorney of record for the Appellant, Attorney Kelly Haragan. Originally Appellant, Warren County Quality of Life Coalition (Coalition), objected to the depositions on the basis of attorney-client privilege and attorney work product and refused to voluntarily produce the witnesses absent a subpoena.

Appellant vigorously opposes United's attempt to depose Mr. Schaeffer and Ms. Weidner. Although raising the attorney–client and attorney work product issues, Appellant is not raising these issues as anticipated in United's Motion. Indeed, Appellant is not claiming that Mr. Schaeffer, an attorney, is representing Appellant in this Appeal. Instead the Coalition argues that Mr. Schaeffer is an expert witness who during this appeal learned of the confidential legal theories and work product of the Coalition's legal counsel. More importantly, its objection to the depositions rests on the fact that it is designating Mr. Schaeffer as an expert witness.

The Board, in addition to our own rules of practice and procedure dealing with discovery, follow the Pennsylvania Rules of Civil Procedure regarding the discovery of experts. Rule 4003.5 of the Pennsylvania Rules of Civil Procedure initially allows only written discovery of "facts known and opinions held by an expert." The Board, "upon cause shown," may order further discovery by other means including depositions.

Appellant's answers to expert interrogatories and/or expert reports are due to be served on

May 19, 2004. Based on the proposed designation of Mr. Schaeffer as an expert witness, and the fact that Ms. Weidner is his assistant, leads us to believe that the proper action at this time is to deny United's Motion without prejudice.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WARREN COUNTY QUALITY OF LIFE COALITION	:	
v.	:	**EHB Docket No. 2003-307-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and UNITED REFINING COMPANY, Permittee	:	

ORDER

AND NOW, this 11th day of May, 2004, United's Motion to Depose Mr. Schaeffer and Ms. Weidner is ***denied without prejudice***.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: May 11, 2004

EHB Docket No. 2003-307-R

c: **DEP Bureau of Litigation**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

STEPHANIE ADAM, et al.	:	
	:	
v.	:	**EHB Docket No. 2002-189-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, STATE CONSERVATION COMMISSION, BERKS COUNTY CONSERVATION DISTRICT and QUAIL RIDGE FARM, Permittee	:	**Issued: May 12, 2004**

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis:

In an appeal from the approval of a nutrient management plan prepared under the Nutrient Management Act and the regulations of the State Conservation Commission, the Board finds that both the Commission's regulations and the plan are deficient for failure to provide any site specific standards for the control of phosphorus contained in the application of manure in a concentrated animal operation for sows. The Nutrient Management Act requires the Commission to identify and establish application standards for all nutrients, but the Commission's regulation only require the plan to contain an application standard for nitrogen.

BACKGROUND

This appeal challenges the approval of the Nutrient Management Plan submitted to the Berks County Conservation District for the operation of a concentrated animal

operation in Hamburg, Perry Township, Berks County, pursuant to the provisions of the Nutrient Management Act[1] and the regulations of the State Conservation Commission issued under that Act. The plan, developed and submitted by the operator of Quail Ridge Farm, calls for the operation of a 2,800 sow production business, the application of some of the resulting manure to the farm's tillable acreage, and the export of other manure to other nearby farms. The Appellants contend that the plan and the Commission's regulations give insufficient protection to the environment because runoff or leaching of nutrients from the manure is likely to pollute groundwater and nearby streams that flow to Lake Ontelaunee, a source of public drinking water.

We consider this appeal now because the Nutrient Management Act provides for an appeal to the Board from the approval of a nutrient management plan even though the Department of Environmental Protection's classification of this farm as a concentrated animal feeding operation means that the farm cannot commence operations until the Department of Environmental Protection issues an NPDES permit to the operator of the farm. That permit may contain additional requirements protective of the environment.

A hearing was held for three days before Judge George J. Miller on October 30 – 31, 2003 and November 3, 2003. The record consists of a transcript of 697 pages and 25 exhibits, including a stipulation of facts. The parties have submitted proposed findings of fact, conclusions of law and legal memoranda. After consideration of these materials we make the following:

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[1] Act of May 20, 1993, P.L. 12, 3 P.S. §§ 1701-1718.

FINDINGS OF FACT[2]

1. The Appellants are Stephanie Adam, Florence Albertson, Merrill Arndt, Dolores Arndt, Rita Decker, Venus Fioravanti, Melvin Fioravanti and Christine Vacarro.

2. The Appellees are the State Conservation Commission (Commission), the Bucks County Conservation District (Conservation District) and Quail Ridge Farm.

3. Appellants Stephanie Adam, Venus Fioravanti and Christine Vaccaro reside on property that either abuts or is near Quail Ridge Farm. (Tr. 16, 18, 20)

4. Appellant Rita Decker's domestic drinking water supply is from a well on her property. (Tr. 8)

5. Appellants Stephanie Adam, Venus Fioravanti, and Christine Vaccaro work at businesses that receive public drinking water from Lake Ontelaunee. (Tr. 16-17, 20-21)

6. Quail Ridge, L.L.C. is owner of a 242.96 acre property located at 1211 Moslem Springs Road, Hamburg, Pennsylvania in Perry Township, Berks County. (Stip., ¶ 7 and Ex. B-2)

7. The operator of Quail Ridge Farm, Country View Family Farms, intends to operate a 2,800 head sow production business at the farm pursuant to the approval of its Nutrient Management Plan by the Conservation District. (Stip. Ex. B-2; Tr. 437-41)

8. The Commission is an eleven-member body created by the Conservation District Law.[3] The Commission, which is an entity within the Department of

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[2] The transcript is designated as "Tr. __." The Board admitted into evidence a stipulation of facts which is designated as "Stip. ¶ __. Additionally, the Board admitted into evidence several stipulated exhibits, designated as "Ex. B- __." The Appellants' exhibits are designated as "Ex. A-__"; the Commission's as "Ex. C-__." The Permittee did not introduce its own exhibits.

[3] Act of May 15, 1945, P.L. 547, *as amended*, 3 P.S. §§ 849-64.

Environmental Protection (Department), provides policy direction on soil, water and conservation issues for the Commonwealth. (Stip., ¶ 4)

9. The Commission was given additional powers and duties to administer the Nutrient Management Act (the Act).[4] This included the power to promulgate regulations in consultation with the Department of Agriculture, the Department of Environmental Protection and the Nutrient Management Advisory Board "establishing minimum criteria for nutrient management plans and other regulatory requirements to implement this Act." Section 1704(1) of the Act.

10. The Act states that the criteria to be established by the regulations are to include an identification of the nutrients defined by the Act and directs that there shall be a presumption that "nitrogen is the nutrient of primary concern" unless otherwise appropriate. Section 1704(1)(i) of the Act.

11. Leaching of nitrogen through the soil can raise groundwater nitrate levels above the EPA drinking water limit, which can adversely affect the health of young children and livestock. (Stip. ¶ 26)

12. The term "Nutrient" is defined by the Act as:

> A substance or recognized plant nutrient, element or compound which is used or sold for its plant nutritive content or its claimed nutritive value. The term includes, but is not limited to, livestock and poultry manures, compost as fertilizer, commercially manufactured chemical fertilizers, sewage sludge or combinations thereof.

Section 1703 of the Act.

[4] Act of May 20, 1993, P.L. 12, 3 P.S. §§ 1701-1718.

13. Nitrogen is essential for the growth of plants. It is one of the "macronutrients" which are those that plants need for optimum growth. Other macronutrients include phosphorus and potassium. (Tr. 377-78; 540-41)

14. The Act specifically directed the Commission in establishing such criteria to consult the Department's *Manure Management for Environmental Protection Manual*, the *Agronomy Guide*, published by The Pennsylvania State University, and the *Pennsylvania Technical Guide for Soil and Water Conservation*, published by the United States Department of Agriculture's Soil Conservation Service. Section 1704(1).

15. A primary purpose of the Nutrient Management Act is to regulate the application of nutrients for certain agricultural operations that generate or utilize animal manure and to prevent the pollution of surface and groundwater. (3 P.S. §§ 1702, 1703 (defining "nutrient management plan") and 1705(5))

16. The Act specifically defines a "nutrient management plan" as follows:

> A written site specific plan which incorporates best management practices to manage the use of plant nutrients for crop production and water quality protection consistent with the criteria established in sections 4 and 6.

17. The Commission promulgated regulations under the Act that were adopted on June 27, 1997, to be effective on October 1, 1997. 27 Pa. Bull. 3161 and 25 Pa. Code Chapter 83, Subchapter D.

18. These regulations and the Act require a nutrient management plan for all concentrated animal operations, such as Quail Ridge Farm, defined as an operation in which the animal density exceeds two animal equivalent animal units per acre. Section 1706(b); 25 Pa. Code § 83.261(b).

19. The regulations provide, among other things, that the plan include the acreage and realistic expected crop yields for each crop group and a determination of the amount of nutrients necessary to achieve realistic expected crop yields. The regulations permit the application of nitrogen in manure only in the amounts necessary to achieve realistic expected crop yields. 25 Pa. Code §§ 83.292, 83.293.

20. The Commission's regulations at 25 Pa. Code § 83.294 require a plan to contain various criteria relating to application procedures, including that "[n]utrients shall be uniformly applied to fields during times and conditions that will hold the nutrients in place for crop growth, and protect surface and ground water in accordance with the approved manure management practices as described in the *Manure Management Manual*. (Stip., ¶ 31)

21. The Commission's regulations at 25 Pa. Code § 83.351 contain minimum standards for the design, construction, location, operation, maintenance and removal from service of manure storage facilities designed to prevent the pollution of surface water and groundwater, and the offsite migration of pollution. These include setback requirements in relation to streams and drinking water supplies.

22. Douglas Goodlander is the Commission's director for nutrient management and was accepted by the Board as an expert in the areas of nutrient management, conservation district procedures and the environmental impact of agricultural practices. He testified to the adequacy of the Commission's regulations and the practices of conservation districts in assuring that the nutrient management plan is given effect. (Tr. 447-588)

23. Douglas Beegle, Ph. D is a qualified expert in the fields of agronomy, nutrient management and the environmental impact of agriculture activities. He is a professor of agronomy at Penn State University and has spent his entire career in the fields of agronomy and nutrient management. (Tr. 287-94)

24. Dr. Beegle served as a technical advisor to the Commission in the development of its nutrient management regulations and wrote the soil fertility chapter of the *Agronomy Guide*. (Tr. 295-96)

25. Dr. Beegle testified that the Commission's regulatory program created a reasonable balance between the goals of optimum crop production and environmental protection, that the approved nutrient management plan was properly prepared under the Commission's regulations and the applicable guides referred to by the legislation including the *Agronomy Guide*. (Tr. 287-433)

26. The Commission's regulation at 25 Pa. Code § 83.293(b) only limits the amount of nitrogen that can be applied to crops and requires that

> The planned manure application rate shall be recorded in the plan. The planned manure application rate may be any rate equal to or less than the balanced manure application rate based on nitrogen. The balanced manure application rate based on nitrogen shall be determined by first subtracting the amount of available residual nitrogen and any other applied nitrogen, such as nitrogen applied in the starter fertilizer, from the amount of nitrogen necessary for realistic expected crop yields and then dividing this by the available nitrogen content of the manure as determined by standard methods.

27. Although the "balanced manure application rate" (BMAR) formula described by Section 83.293(b), was developed independently of the regulation, its primary purpose

is to optimize crop production and to minimize impact to the environment by nitrogen pollution. (Tr. 313)

28. Dr. Beegle's opinion that the balancing of nitrogen alone for the application of manure was based in part on the fact that nitrogen is the most mobile of the nutrients in manure and the nutrient most likely to cause direct human health concerns. (Tr. 300, 303-04, 378-79)

29. Dr. Beegle also testified that he knew of no better way to manage nutrients than the program set forth in the Commission's regulations. (Tr. 350-51, 360)

30. Not applying nitrogen would severely limit agricultural activity in Pennsylvania because a certain level of added nitrogen is necessary to achieve an adequate crop yield. (Tr. 303)

Phosphorus

31. The Commission's regulations do not identify phosphorus as a "nutrient" or limit its application. However, the Commission's regulations provide that for the development of the initial plan that soil tests be required to represent the fields in the operation for phosphorus (P), potassium (K), soil pH and lime. 25 Pa. Code § 83.291(e).

32. The regulations also require that the nutrient content of manure be recorded in the plan. 25 Pa. Code § 83.291(b)(3).

33. Phosphorus, while essential to plant growth, is tightly bound to the soil, so that under some circumstances it may be reasonable to regulate phosphorus through best management practices including erosion and sedimentation practices required by other laws. (Tr. 353-59, 417-18)

34. However, some phosphorus is soluble in water and can be carried off by runoff to ground and surface water. (Tr. 424-29)

35. Dr. Beegle and Mr. Goodlander testified that phosphorus at certain levels is a pollutant and human health concern. (Tr. 425, 591-98)

36. Dr. Beegle testified that if soil tests indicate the presence of phosphorus at a greater level than needed for plant growth, he would not recommend the application of additional phosphorus. (Tr. 390-92)

37. If a soil test indicates that the phosphorus level in soil is 200 parts per million, that is an indication that phosphorus pollution might be a concern. (Tr. 425; 597-98)

38. Mr. Goodlander also observed that although it takes a long time for phosphorus to build up in soil, it also takes a long time for it to draw down. (Tr. 591-98)

39. Dr. Beegle has never visited the Quail Ridge Farm or done a site review. (Tr. 417-18, 424)

Development and Contents of the Plan

40. Jennifer Reed, a certified Nutrient Management Specialist, prepared this Nutrient Management Plan for the operator of the Quail Ridge Farm. (Stip., ¶ 5; Tr. 22-110; Ex. B-2)

41. The plan describes, among other things, the facilities for the sow production operation, states that some of the manure will be applied to the farm's 166.6 acres of cropland for the principal crops of mixed hay, corn and soybeans, and that some of the manure will be exported to neighboring farms not under the management of Quail Ridge Farms. (Ex. B-2)

42. Donald W. Reinert is the employee of the Conservation District who reviewed the Quail Ridge Farm nutrient management plan in connection with its approval by the Conservation District. He testified to the adequacy of the plan and conservation district procedures as an expert in nutrient management and Conservation District procedures. (Tr. 600-35)

43. The Conservation District approved the plan on July 31, 2002 after review by Donald Reinhart under the Commonwealth's Nutrient Management Program pursuant to the Commission's delegation of this authority and the authority granted the District by the Conservation District Law, Act of May 15, 1945, P.L. 547, No. 217, 3 P.S. ¶¶ 849-864. (Stip., ¶¶ 17 and 18; Tr. 606-17)

44. Donald Reinert checked the calculations used in the plan for accuracy. He concluded that they had been performed in accordance with the regulations. (Tr. 606-09)

45. The plan contains calculations identifying the proposed operation as a Concentrated Animal Operation (CAO). Specifically, the CAO would contain swine totaling 1,379.8 Animal Equivalent Units (AEUs) on an annualized basis, with fields of 166.6 acres on which manure is to be applied, for a total of 8.3 AEUs per acre. (Stip. ¶ 14)

46. The plan estimates that a total of 2,975,860 gallons of manure will be generated by the operation, 1,055,870 of which will be applied to the fields of Quail Ridge Farm. The remaining 1,919,990 gallons will be exported to three nearby farms operated by Stanley Derstine, Earl Christman and Floyd Kurtz. (Stip., ¶ 15; Ex. B-2, p. 3)

47. The plan also details the acreage available for manure application at each importing farm, the amount of manure that will be imported by each and the intended season for manure transfers. (Stip ¶ 32; Ex. B-2)

48. The plan sets forth the acreage and expected crop yields for each of the four crop groups as follows: mixed hay, 77.8 acres with expected yield of 4 tons per acre; corn-grain (following beans), 10 acres with expected yield of 125 bushels per acre; corn-grain, 34.4 acres with expected yield of 125 bushels per acre; and soy beans, 44.4 acres with expected yield of 30 bushels. (Stip., ¶ 29; Stip. Ex. B-2, p. 6)

49. As required by 25 Pa. Code § 83.281(b)(4), the plan contains a listing of the eight types of soils and the slopes that exist at Quail Ridge Farm. (Stip., ¶ 12)

50. Manure is the only fertilizer to be used on the farm. No chemical fertilizers are proposed by the plan. (Tr. 40-45)

51. The plan provides calculations of the planned manure application rates based on the nitrogen necessary to achieve realistic crop yields. (Stip. ¶ 30; Ex. B-2, p. 6)

52. Ms. Reed testified that in developing the Quail Ridge Farm plan for needed nutrients she looked only at balancing the manure application rate for nitrogen because that is what is set forth in the regulations. She said that under the regulations it is implied that the needs of the crops for nutrients phosphorus and potassium are met by balancing for nitrogen. (Tr. 27-28, 30-35)

53. Nitrogen is balanced based upon the needs of a particular crop and the yield expected to be derived from that crop. (Tr. 90-104; 299)

54. Ms. Reed did not know whether applying manure at a rate which meets the nitrogen needs of the crop would result in an overapplication of potassium and phosphorus. (Tr. 80-81)

55. Soil samples from the farm were tested for not only nitrogen recommendations, but recommendations for phosphorus, potassium and other nutrients essential for plant growth. (Tr. 46-47)

56. The plan states that amendments to the plan will be in accordance with the requirements of 25 Pa. Code § 83.371. This allows for plan updates on an annual basis and a mandatory three year review and approval by the County Conservation District. (Stip., ¶ 36)

57. If the farm fails to meet its anticipated crop yields within three years, it must revise its plan to reflect lower manure application rates. (Tr. 507-08)

58. There are portions of the plan related to Best Management Practices (BMPs) which contains time lines for practices such as erosion and sedimentation planning and conservation planning, in addition to manure storage construction and certification, soil sampling and manure sampling. (Stip., ¶ 35; Stip. Ex. B-2, p. 4, 8, 9 and following p.10)

59. The BMPs to control run-off incorporate general manure handling practices from the publication *Manure Management for Environmental Protection.* These practices include setbacks for manure spreading from sink holes, private drinking water sources and surface water bodies. (Ex. B-2; Tr. 113-14; 513-17)

60. A BMP adopted by the plan is to incorporate manure into the soil the same day that it is applied. (Stip ¶ 25; Tr. 115-16, 349-50)

61. This practice decreased the possibility of run-off and ameliorates the volatization of the nitrogen. (Tr. 349-50)

62. These measures are believed to control phosphorus pollution by holding the soil in place. (Tr. 355; 487-88, 536-37, 591-96)

63. The Commission's regulations at 25 Pa. Code § 83.362(b) and (c) require the nutrient application rates to be re-balanced whenever adjustments are made in an approved plan, and to have a nutrient management specialist review the plan at least every three years to ascertain whether a plan amendment needs to be submitted for approval. (Stip., ¶ 38)

64. The Quail Ridge Farm also meets the definition of a "concentrated animal feeding operation" or CAFO. Accordingly, it is required to obtain an NPDES permit pursuant to the Department's regulations found in Chapter 92. It may not begin operation until it secures an NPDES permit. (Stip. ¶¶ 49, 51, 52)

The Farm's Environmental Setting

65. Todd Kincaid, Ph.D, a qualified expert in hydrology for Appellants, testified to his study of the environmental setting of Quail Ridge Farm and likely pollution of streams and Lake Ontelaunee as a result of the approved operation. (Tr. 124-26)

66. Philip Dougherty, Ph.D is a qualified expert in the field of chemistry and is a professor of chemistry and biochemistry at Albright College in Reading, Berks County, Pennsylvania. He has done personal research on the water quality of Lake Ontelaunee. (Tr. 215-16, 227-37) The bedrock in the area of the farm is composed of two members of the Martinsburg Formation consisting of limestone or limestone and shale. (Tr. 136)

67. The soils on Quail Ridge Farm consist of the Berks Series, the Weikert-Berks Series and a small amount of the Litz Series. (Tr. 147; Ex. B-2, Soils Map)

68. Book values of soil permeability indicate that these soils transmit water rapidly. (Tr. 147, 188, 189)

69. Well-drained soils are typically the most productive from an agricultural point of view. (Tr. 359-60)

70. A perennial stream drains the farm property to Bailey Creek on the East side. That flow goes to Maiden Creek and on to Lake Ontelaunee. The flow from a perennial stream on the West side flows to the Schuylkill River. (Tr. 130-34; Ex. A-9)

71. The Department's regulations list Maiden Creek as a stream with a protected use to support the maintenance and propagation of warm water fishes. (Stip. ¶ 42; 25 Pa. Code § 93.9f)

72. According to the Department's regulations, Lake Ontelaunee is impaired from suspended solids and nutrients from a variety of sources, including urban runoff/storm sewers, agriculture, on-site wastewater and municipal point source pollution. (Stip ¶ 44)

73. Lake Ontelaunee is listed by the Department as an environmentally impaired lake with a medium priority. The lake is impaired from suspended solids and nutrients from a variety of sources including urban runoff/storm sewers, agriculture, onsite wastewater and municipal point sources. (Stip., ¶¶ 43, 44)

74. There are springs on the farm property some of which result in water flowing over the land following a rain storm. (Tr. 133)

75. There are 65 domestic wells completed in the shallow aquifer and 152 wells completed in the deeper aquifer within two and one-half miles of the farm. (Tr. 128)

76. There are also several caves near the area of the farm property. (Tr. 137-41)

77. The existence of these caves and testimony that water flowed into one of them during a rainstorm indicate that faults in the limestone bedrock near these caves may provide preferential pathways for flows of groundwater. (136-46)

78. There are no mapped caves under the Quail Ridge Farm, but Dr. Kincaid believed that there was a statistical likelihood that there may be caves. (Tr. 177)

79. He also testified that the soils at the Quail Ridge Farm are too thin and the probable infiltration rates too high to effectively absorb nutrient and bacterial pollutants before they reach the water table. (Tr. 158)

80. Dr. Kincaid testified that the Quail Ridge Farm operation created an elevated susceptibility to pollution of surface and groundwater. (Tr. 155-56, 158)

81. He further testified that once the nutrients are in the groundwater system existing fractures and dissolved conduits in the bedrock will facilitate the down-gradient transmission of the pollutants to sensitive receptors including shallow domestic wells and springs and streams that discharge into Maiden Creek and Lake Ontelaunee. (Tr. 158)

82. While he testified that he held this opinion to a reasonable degree of scientific certainty (Tr. 158), he agreed that his estimate of permeability rates was based on book values rather than on measurements, that he had no direct knowledge of subsurface conditions at the site, that his assumptions as to soil depth was based on observation of outcrops and road cuts rather than actual measurements, and that the existence of fractures and caves in the limestone bedrock under the farm was based on probability rather than direct observation. (Tr. 147-49, 172-78)

83. Dr. Kincaid would recommend testing the waters before and after implementation of the plan rather than monitoring wells because monitoring wells are ineffective in the karst environment at the farm property. (Tr. 180-81)

84. Conditions in Lake Ontelaunee range from eutropic to highly eutropic. That is, there is extreme algae growth on the surface and oxygen is depleted in the water. Without adequate oxygen aquatic life can not survive. (Tr. 228-29)

85. Dr. Dougherty testified that the lake is near collapse which will render it unusable for domestic and industrial use. (Tr. 228)

86. Dr. Dougherty believed that nitrate pollution is the primary cause of the lake's condition. (Tr. 227)

87. Dr. Dougherty has not completed his study of pollution caused by phosphates. However, phosphates are one of the growth factors for blue-green algae which is prevalent on Lake Ontelaunee. (Tr. 227)

88. The crop yields in the Quail Ridge plan are consistent with the soil types listed for the farm, and typical of other farms in the area. (Tr. 606-09)

DISCUSSION

In this third-party appeal of a nutrient management plan, the Appellants have the burden of proving by a preponderance of the evidence that the Conservation District erred in approving the Quail Ridge Farm Nutrient Management Plan or that the Commission's nutrient management regulations are defective under the Act.[5] Our review is *de novo*, therefore we will consider not only evidence which was considered by the

[5] 25 Pa. Code § 1021.122(c)(2); *Ziviello v. DEP*, 2001 EHB 1177.

Conservation District in approving the plan, but also evidence which was admitted by the Board during the hearing.[6]

The Appellants contend that the approval of the Nutrient Management Plan for Quail Ridge Farm should be set aside because (1) the Commission's regulations fail to comply with the intent of the Act to protect the environment, (2) the provisions of the regulations providing for the export of manure is *ultra vires*, (3) the nutrient management plan improperly implements the regulations and the guidance documents the Act directed the Commission to consider in the development of its regulations, (4) the operation of the farm under the plan will result in the pollution of groundwater and nearby streams that flow into Lake Ontelaunee, a source of public drinking water, and (5) the approval of the plan is contrary to Article 1, § 27 of the Pennsylvania Constitution as interpreted by the Commonwealth Court in *Payne v. Kassab*.[7]

The Commission's Regulations

Because the Nutrient Management Act specifically granted the Commission the authority to promulgate regulations under the Act under the criteria set forth in section 4 of the Act,[8] we are bound to respect them as part of the statute so long as they are (a) within the granted power, (b) issued pursuant to proper procedure, (c) reasonable and (4) track the meaning of the statute and do not violate the intent of the legislation.[9]

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[6] *Pequea Township v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998); *Warren Sand and Gravel Co. v. Department of Environmental Resources*, 341 A.2d 556 (Pa. Cmwlth. 1975).

[7] 312 A. 2d 86 (1973), *affirmed on other grounds*, 361 A.2d 263 (Pa. 1976).

[8] 3 P.S. § 1704.

[9] *Commonwealth v. Gilmour Mfg. Co.*, 822 A.2d 676 (Pa. 2003); *Bailey v. Zoning Board of the City of Philadelphia*, 801 A.2d 492 (Pa. 2002).

The fulcrum of the Appellants' attack on both the Commission's regulations and the Conservation District's approval of the Nutrient Management Plan is the contention that the primary purpose of the Nutrient Management Act is to prevent pollution of surface water and groundwater by nutrients from certain agricultural operations. The Commission and Quail Ridge respond that this is too simplistic an interpretation of the Act. They contend that the Act was intended to require implementation of best management practices to manage the use of plant nutrients for crop production and water quality protection so that there can be both successful, economic farming and clean water in Pennsylvania.

We interpret the Act to have the primary, dual purpose of regulating the use of manure produced in a concentrated animal operation for plant growth by managing the use of manure in a way that will minimize nutrient pollution to surface and groundwater, in part by the application of best management controls. The Act's general statement of legislative purpose points to the importance of programs for the prevention of pollution. In addition, the Act's definition of the Nutrient Management Plan required by the Act is a plan that incorporates best management practices "to manage the use of plant nutrients for crop production *and* water quality protection"[10] consistent with the criteria established in sections 4 and 6 of the Act. The Act's definition of "best management practice" is a practice or combination of practices "to manage nutrients to protect surface and groundwater taking into account applicable nutrient requirements for crop utilization." [11]

The Appellants' attack on the regulations proceeds on the assumption that they and the approved nutrient management plan must be viewed alone as the sole provisions

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[10] 3 P.S. § 1703 (*emphasis supplied).*
[11] 3 P.S. § 1703.

for protection of the environment against the impact of the operation of the Quail Ridge Farm. The Commission, by contrast, argues that the nutrient management regulations are but one component of a multi-level statutory and regulatory regime that does an effective job in addressing the environmental effects of land application of manure. The Commission points to both the Department's powers and regulatory programs under the Clean Streams Law that also deal with numerous aspects of agricultural operations. It refers particularly to the Department's regulations at 25 Pa. Code Chapters 91 (water pollution and control at agricultural operations), 92 (pollution control through NPDES permits) and 102 (erosion and sedimentation controls), as well as the powers of the conservation district to assure that those requirements are met.

As a generality, we are inclined to agree with the Commission. The Nutrient Management Act specifically reserves all of the powers of the Department and the conservation districts under other laws, including the Clean Streams Law.[12] The Clean Streams Law in general prohibits any entity from causing pollution to the waters of the

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[12] Section 1716 of the Act provides:

> Nothing in this act shall limit in any way whatever the powers conferred upon the commission, Department of Agriculture, department or conservation district under laws other than this act, including, but not limited to, the act of June 22, 1937 (P.L. 1987, No. 394), known as The Clean Streams Law and the act of July 7, 1980 (P.L. 380, No. 97), known as the Solid Waste Management Act and common law. All such powers are preserved and may be freely exercised. A court exercising general equitable jurisdiction shall not be deprived of such jurisdiction even though a nuisance or condition detrimental to health is subject to regulation or other action by the board under this act.

3 P.S. § 1716.

Commonwealth.[13] Chapters 91 and 102 would apply to the operation of Quail Ridge Farm as a concentrated animal operation (CAO). The conservation districts have been delegated authority over both the nutrient management program and the Department's sedimentation and control requirements of Chapter 102. The NPDES requirements of Chapter 92 would apply to those operations because its proposed operation would be regulated as a concentrated animal feeding operation (CAFO) under Chapter 92 of the Department's regulations. The Department and the Conservation District presumably would exercise these powers to assure that these regulatory provisions are complied with.

However, the existence of these powers designed to prevent pollution to surface and groundwater does not meet the issue of whether the Commission's regulations track the meaning of the Nutrient Management Act and do not violate the intent of the Act to allow this type of agricultural development, but also give adequate protection against water pollution from the intensity of the regulated activity and its potential to cause pollution.

The Appellants claim that the Commission's regulations are defective because they do not require specific regulation of the land application of phosphorus relative to the specific need of a crop for phosphorus. The Commission's regulations only require that the application of manure be based on the crop's need for nitrogen.[14] The full argument is that section 4 of the Act requires the identification of nutrients as defined by the Act and the establishment of procedures "to determine proper application rates of nutrients to be applied to land based on conditions of soil and levels of existing nutrients

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[13] 35 P. S. § 691.401.

[14] Section 83.293 of the regulations, although titled "Determination of nutrient application rates" only limits the application rate of manure to "any rate equal to or less than the balanced manure application rate based on nitrogen." 25 Pa. Code 83.293 (b).

in the soil and the type of agricultural . . . production to be conducted on the land."[15] Accordingly, the Appellants argue that the Commission's regulations are defective because they do not identify phosphorus as a nutrient for purposes of the determination of the proper application rates of nutrients to be applied to land. In this connection, they point out that the statement of purpose of the Commission's regulations refers to the

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[15] Specifically the regulation provides:

> The commission shall have the following powers and duties:
>
> (1) Within two years after the effective date of this act and periodically thereafter, to promulgate regulations, in consultation with the Department of Agriculture, the department and the board, establishing minimum criteria for nutrient management plans developed in accordance with section 6 and other regulatory requirements to implement this act. In establishing such criteria, the commission shall consult the department's Manure Management for Environmental Protection Manual, the Pennsylvania Agronomy Guide, published by The Pennsylvania State University, and the Pennsylvania Technical Guide for Soil and Water Conservation, published by the United States Department of Agriculture's Soil Conservation Service. The criteria to be established pursuant to this section shall include the following:
>
> (i) An identification of nutrients as defined by this act. Unless otherwise appropriate pursuant to specific criteria which shall be established by the commission, there shall be a presumption that nitrogen is the nutrient of primary concern.
>
> (ii) The establishment of procedures to determine proper application rates of nutrients to be applied to land based on conditions of soil and levels of existing nutrients in the soil and the type of agricultural, horticultural or floricultural production to be conducted on the land.
>
> . . . .

3 P.S. § 1704(1)(i)-(ii)

findings by EPA and the Department that excess levels of pollutants, including sediment, nitrogen and phosphorus are being delivered to the Chesapeake Bay as a result of improper agriculture activities.[16]

The Commission argues that the Act's statement that there shall be a presumption that nitrogen is the nutrient of primary concern coupled with the testimony of its experts that balancing for nitrogen is alone sufficient for the protection of the environment, justifies using only a nitrogen balancing test. Dr. Beegle testified that it is reasonable to have required a balancing formula based only on nitrogen because nitrogen is the most mobile of nutrients in manure and is the one most likely to cause direct health concerns.[17] By contrast, phosphorus, while essential to plant growth, is tightly bound to soil so that it is difficult to make available to crops and is more reasonably dealt with by best management practices including erosion and sedimentation control.[18]

The primary difficulty in resolving this dispute is that there is very little other than the language used in the statute to determine the intent of the General Assembly as to how the nutrient content of manure is to be balanced in determining the application rates for manure. None of the parties advance any legislative history in favor of their interpretation. While the Act directed the Commission to consult the *Agronomy Guide*, the only version of that *Guide* in evidence is the 2003 version. Dr. Beegle testified that the regulatory formula was developed as a result of research independent of the regulations to optimize crop production and to minimize any impact on the

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[16]25 Pa. Code § 83.101(a). The Quail Ridge Farm is not located in the Chesapeake Bay watershed, but the Schuykill River and Delaware Bay watersheds.

[17]Tr. 300, 378-79.

[18] Tr. 353-56.

environment.[19] However, there is no direct evidence to indicate that the General Assembly was aware of the balanced nitrogen formula before the Act was passed. Dr. Beegle said that he was an advisor to the group that wrote the regulations, but acknowledged that he was not involved with the decision to create a presumption that nitrogen is the primary nutrient of concern.[20]

In addition, there is little evidence in the record as to whether or not a balanced nutrient application rate based on nutrients other than nitrogen would be truly workable in crop production. The Appellants presented no testimony from an agronomist. The Appellants point to a statement in the *Agronomy Guide* to the effect that if manure were to be applied based on the phosphorus content to the manure, two-to-four times as much land would be needed to be utilized for the manure, and additional nitrogen would have to be applied to meet the crop's needs. This statement was not the subject of testimony at the hearing and we cannot consider such an unexamined statement to be a substitute for testimony from a qualified agronomist subject to further examination. More convincing evidence than this is required for a successful challenge to the adequacy of the Commission's regulations even though this statement may have been made or approved by Dr. Beegle in the preparation or his review of the *Agronomy Guide*. Dr. Dougherty criticized the regulatory formula only because it results in the application of too much nitrogen.[21] Dr. Beegle, the only expert in the field of agronomy to testify, testified that the formula based on nitrogen was the best that could be done to balance crop production and environmental protection. Further, it was Dr. Beegle's view that phosphorus was

[19] Tr. 313.
[20] Tr. 295, 300.
[21] Tr. 236-47

more properly controlled by best management practices including erosion and sedimentation controls.[22]

Although we do not believe that the Appellants have met their burden of proving that the failure of the regulations to provide for a nutrient application rate based on phosphorus means that the regulations necessarily fail to comply with the intent of the Act, it is clear that the Commission's regulations fail to meet the command of section 4(1)(i) of the Act that the Commission establish criteria for nutrients including "an identification of nutrients as defined by this act" by failing to identify phosphorus and provide procedures to determine proper application rates of phosphorus to crops. It is not our role to say that the application of manure must be determined based on phosphorus balancing rather than nitrogen balancing. If additional nitrogen fertilizer would be needed to meet crop needs under a phosphorus-based formula, such a requirement might be contrary to the Act's presumption that nitrogen is the primary nutrient of concern, and would not meet its purpose of minimizing nitrogen pollution. But this is not to say that phosphorus should not have been considered in the establishment of procedures for determining application rates.

The careful consideration of phosphorus in the regulatory context is hardly an irrelevant issue. Mr. Goodlander acknowledged that there can be a build up of excessive phosphorus and that soluble phosphorus can be lost in run off from fields of very high or excessive soil phosphorus levels. In addition, phosphorus build up appears to be a negative factor in crop production. Dr. Beegle acknowledged that the sole use of a nitrogen balancing test might well result in the application of excessive levels of

[22] Tr. 351-56, 360.

phosphorus and that he would not recommend the application of phosphorus above its optimum level.[23] He testified that he would not recommend the application of additional fertilizer under these circumstances.[24]

Since the application of excess phosphorus may be both an agronomic and environmental concern, we think the Commission's reliance on existing conservation programs alone to control phosphorus runoff cannot be in compliance with the Act's commands with respect to the Commission's establishment of regulatory criteria identifying the nutrients regulated under the Act and providing procedures to determine the proper application rates of nutrients, including phosphorus, to be applied to the land.

First, the definition of "nutrient" in the Nutrient Management Act includes both nutrients, and sources of nutrients:

> A substance *or* recognized plant nutrient, element *or* compound which is used or sold for its plant nutritive content or its claimed nutritive value. The term includes, *but is not limited to*, livestock and poultry manures, compost as fertilizer, commercially manufactured chemical fertilizers, sewage sludge or combinations thereof. [25]

References to other sections of the Act make it clear that the word "nutrient" means more than just nitrogen and nitrogen sources. If the General Assembly had intended for "nutrient" to mean only nitrogen and nitrogen sources, it would have done so. For example, a nutrient management plan is defined as a plan "to manage the use of *plant nutrients* . . ." not just nitrogen. And the Act charges the Commission to promulgate regulations which include "an identification of *nutrients* as defined by this act." If the General Assembly only wanted the Commission to concern itself with nitrogen, there

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[23] Tr. 390-92.
[24] Tr. 390-92.
[25] Section 1703 (*emphasis added*).

would have been no need to require the Commission to further identify nutrients. Although the Act specifically states that nitrogen is the nutrient of primary concern, it does not say that nitrogen is the *only* nutrient of concern. At most, the General Assembly intended nitrogen to be subject to perhaps the strictest controls, but there is nothing in the language of the statute which suggests that it was concerned only with nitrogen. Instead the Act clearly requires the Commission to identify "nutrients", to determine the proper application rates of "nutrients" based upon the "conditions of the soil, [and] levels of existing nutrients in the soil" and to identify best management practices for nutrients.[26] Although, as explained above, there is no evidence that balancing is the only manner that phosphorus can be controlled, it must nevertheless be addressed in some manner, with respect to the "conditions of soil and levels of existing nutrients in the soil and the type of agriculture . . . ."[27]

Second, there is no principled argument that can be made that phosphorus and potassium are not nutrients as defined by the Act. Dr. Beegle unambiguously testified that phosphorus and potassium were both plant nutrients, essential to the growth of plants.[28]

Third, phosphorus, at least at some level, is a pollution concern. The Commission itself expressed that concern as it relates to the Chesapeake Bay in Section 83.101 of the regulations, quoted above. Although not as pressing a problem as nitrogen pollution, both Dr. Beegle and Mr. Goodlander testified that phosphorus at certain levels is a pollutant

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[26] Section 1704(1)(i)-(iii).

[27] Section 1704(1)(ii).

[28] He defined a "nutrient" generally as "an essential element that the plant has to have to complete its lifecycle" and that phosphorus was one of these elements. (Tr. 377-78)

and human health concern.[29] Mr. Goodlander also observed that although it takes a long time for phosphorus to build up in soil, it also takes a long time for it to draw down.[30]

Finally, the requirement of the Commission's regulations for soil testing of phosphorus in an initial nutrient management plan to represent the fields in operation is a clear recognition by the Commission that phosphorus is a nutrient of significant concern within the regulatory requirements of the Act. Accordingly, we believe that the failure of regulations to follow through with this testing requirement by requiring that the test results be used and considered in the preparation in the initial plan is contrary to the purposes of the Act and has resulted in a plan that is deficient for its failure to specifically consider phosphorus pollution in any way.

The regulations contain no requirement that a nutrient management planner consider what levels of phosphorus might already be in the soil and whether erosion control alone is sufficient to protect the water resources that may be present on a particular site and nearby areas. Although erosion is the major manner in which phosphorus can travel to pollute water resources, it is not the only way that phosphorus can travel. It can be water soluble, albeit less so than nitrogen.[31] Because the Commission's regulations did not require her to do so, Jennifer Reed did not consider phosphorus when she wrote the plan for the Quail Ridge Farm. She testified that phosphorus was not a component of the Quail Ridge Plan in relation to the manure to be

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[29] Tr. 425; Tr. 591-98. Dr. Beegle testified that it is important to test soil for phosphorus and potassium content from a crop production point of view to make sure that these elements are at optimum levels. (Tr. 395-96) Hence, the efficiency of plant growth is likely influenced by the collective balance of those nutrients, therefore some attention to levels of phosphorus and potassium is important to crop yield and therefore important to minimizing nitrogen pollution.

[30] Tr. 591-96.

[31] Tr. 424.

applied.[32] Although soil testing was performed and she received a recommendation for phosphorus and potassium, this data was not used in the preparation of the plan.[33] She did not know whether applying manure in accordance with the nitrogen content of the manure would result in an over-application of phosphorus and potassium and whether that over-application may result in pollution, as she only received training on the application of nitrogen.[34] Although the soil conservation plan references nutrient management generally, it does not specifically account for potential phosphorus pollution.[35] While Donald Reinert testified that he reviewed the soil conservation plan to make sure that it was consistent with the best management practices detailed in the nutrient management plan, it was not reviewed specifically from the frame of reference of controlling phosphorus.

It may well be, as Dr. Beegle and Mr. Goodlander testified, that phosphorus -- in most cases -- is best managed by soil conservation techniques and erosion control as outlined in Chapter 102 of the Department's regulations.[36] Douglas Goodlander, the Commission's Executive Director, testified that in the development of the regulations the Commission focused most of their attention on nitrogen on the understanding that phosphorus is being addressed through existing conservation programs.[37] Addressing phosphorous through existing conservation programs is hardly in compliance with the

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[32] Tr. 32.

[33] Tr. 31-32.

[34] Tr. 40-45, 80-81.

[35] Ex. C-5.

[36] Chapter 102 requires the implementation and maintenance of best management practices to minimize the potential for "accelerated erosion" and sedimentation. "Acceleration erosion" is the "removal of the surface of the land through the combined action of human activities and the natural processes, at a rate greater than would occur because of the natural process alone."

[37] Tr. 487-88.

Act's requirements that the regulations identify the nutrients defined by the Act. Further, section 4(1)(ii) of the Act requires the criteria for nutrients to be established under the Act to include:

> The establishment of procedures to determine proper application rates of nutrients to be applied to the land based on conditions of soil and existing nutrients in the soil and the type of agricultural, horticultural or floricultural production to be conducted on the land.

At this time, there is nothing in the Commission's nutrient management regulations which provides that soil conservation as regulated by other programs is specifically appropriate to control phosphorus. Specifically, there are no findings by the Commission that the best management practices developed in the context of Chapter 102 are appropriate for the purpose of limiting phosphorus pollution, regardless of the conditions on a certain site.[38] There is also no explicit prerequisite which requires compliance with other regulations before a nutrient management plan can be approved.[39] This lack of direction by the Commission ignores the mandate of the General Assembly to establish procedures to determine proper application rates for nutrients, including phosphorus for the control of nutrient pollution as embodied in Section 4 (1)(ii) of the Act.

We also conclude that the failure of the Commission's regulations to establish such procedures for nutrients other than nitrogen in developing a nutrient management

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[38] We also note that the soil conservation plan was not approved by the Commission, but by the U.S. Department of Agriculture Natural Resources Conservation Service. There is no evidence in the record which explains the relationship between the two agencies and what the review of the USDA-NRCS entails. (Ex. C-5)

[39] *Cf. Solebury Township v. DEP*, EHB Docket No. 2002-288-MG (Adjudication issued March 5, 2004)(observing that the NPDES regulations require compliance with mining law); *Tinicum Township v. DEP*, 2002 EHB 822); *Oley Township v. DEP*, 1996 EHB 1098 (Safe Drinking Water Act regulations require compliance with other laws).

plan is contrary to the intent of the Act. This failure has resulted in the approval of a nutrient management plan that is deficient for its failure to consider phosphorus in any way in the development of the plan for the Quail Ridge Farm.[40]

While we therefore set aside the District's approval of the Quail Ridge Nutrient Management Program, we are sensitive to the fact that our decision may delay the implementation of this important regulatory program. We might therefore be tempted to permit reconsideration of the Quail Ridge Nutrient Management Plan if a revised plan were developed giving consideration to a limitation on the application of phosphorus in the application formula or otherwise. However, we are not authorized to promulgate regulations. Mr. Goodlander testified that he was just concluding three studies of phosphorus with the Nutrient Management Advisory Board and State Conservation Commission.[41] Perhaps those studies will enable the Commission to promulgate promptly proposed amendments to its regulations with respect to phosphorus and the identification of other nutrients governed by the Act.

In view of our disposition with respect to the Commission's regulations, we do not reach many of the other claims of the Appellants such as the claimed inadequacy of the balanced manure application rate contained in the regulations, whether the regulations with respect to the export of manure are "ultra vires," or whether the Commission's regulations are in violation of Article 1, Section 27 of the Pennsylvania Constitution by

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[40] *Cf. Dauphin Meadows, Inc. v. DEP*, 2000 EHB 521 (reliance on a policy document not properly promulgated as a regulation can not form the basis for a Department action).

[41] Tr. 598.

reason of their failure to meet the environmental protection standards articulated by the Commonwealth Court in *Payne v. Kassab*. [42]

We therefore make the following:

CONCLUSIONS OF LAW

1. The Board's review is *de novo. Pequea Township v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998); *Warren Sand and Gravel Co. v. Department of Environmental Resources*, 341 A.2d 556 (Pa. Cmwlth. 1975).

2. The Appellants bear the burden of proof. 25 Pa. Code § 1021.122(c)(2).

3. The purpose of the Nutrient Management Act is to permit the use of manure for plant growth by managing manure in a way that will minimize pollution to surface and groundwater. 3 P.S. §§ 1702; 1703.

4. The Appellants failed to prove that the purpose of the Act to minimize pollution can not be met without requiring testing of surface and groundwater.

5. The Nutrient Management Act does not necessarily require that phosphorus be controlled by an application rate balanced for phosphorus.

6. The Nutrient Management Act does require the Commission to establish procedures to determine proper application rates for plant nutrients other than nitrogen, such as phosphorus.

7. The regulations of the State Conservation Commission fail to track the meaning of the Nutrient Management Act and violate the intent of this legislation to the extent that the regulations fail to identify phosphorus as a nutrient under the Act and fail

[42] We further do not reach the contentions in the Commission's motion to strike certain references made by the Appellants to documents not in the record or improperly relied upon by the Appellants in their reply brief. These materials played no role in our consideration or disposition of this appeal.

to provide any procedures to determine proper application rates for phosphorus in the application of manure.

8. The Conservation District erred by approving the Quail Ridge Nutrient Management Plan without consideration of whether the plan adequately protected water resources from phosphorus pollution because of the failure to the Commission to establish procedures for determining proper application rates for phosphorus.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STEPHANIE ADAM, et al.	:	
	:	
v.	:	**EHB Docket No. 2002-189-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
STATE CONSERVATION COMMISSION,	:	
BERKS COUNTY CONSERVATION	:	
DISTRICT and QUAIL RIDGE FARM,	:	
Permittee	:	

ORDER

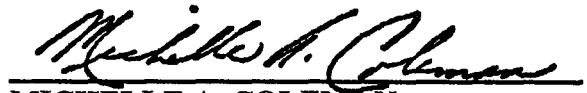
AND NOW, this 12th day of May, 2004, IT IS HEREBY ORDERED that the appeal of *Stephanie Adam, et al.* from the approval by the Bucks County Conservation District of the Nutrient Management Plan for the Quail Ridge Farm is SUSTAINED and that approval is hereby set aside.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: May 12, 2004

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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